Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

Petitioner,

v.

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974; MICHAEL HOLLAND; DONALD PIERCE ELLIOT SEGAL; JOSEPH STAHL, II

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. **Whether the lower courts erred on this issue of first impression for this Court by failing to apply a presumption of entitlement to interest on delayed damages under ERISA claims ~~rather than~~ but instead adding a condition that the plaintiff has the burden of proving that the fund acted arbitrarily and capriciously in delaying benefits?**

II. **Whether the lower courts erred in denying class action certification on the basis of the absence of a common issue of law or fact?**

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated February 11, 2003, was reported at 319 F.3d 612 (2003) (hereinafter Fotta II) and appears at Appendix p. 7A. The trial court's Findings of Fact and Conclusions of Law in the United States District Court for the Western District of Pennsylvania and Order granting judgment in favor of Defendants following a nonjury trial dated March 29, 2001 was not reported and appears at Appendix p. 25A. The lower court's Memorandum denying the Plaintiff's Motion for class certification was not reported and appears at p. 47A.

STATEMENT OF JURISDICTION

Petitioner seeks this Court's review of the judgment of the United States Court of Appeals for the Third Circuit entered February 11, 2003. Rehearing was requested but was denied on March 13, 2003. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner filed suit against the Respondents under the provisions of § 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(3), which provides:

§ 1132. Civil Enforcement

(a) A civil action may be brought--

* * * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

* * * *

STATEMENT OF THE CASE

This is a claim made under the Employment Retirement Security Act of 1974 (ERISA) seeking recovery of interest on pension benefit payments paid Plaintiff Abraham Fotta from the United Mine Workers of America 1974 Pension Trust and seeking class certification for those similarly situated. Fotta is a disabled miner who had to wait nine years to receive his disability payments. Although he has received the delayed payments he has sued the pension fund for the interest that would have accumulated on the delayed payments.

The suit was filed in the United States District Court for the Western District of Pennsylvania on March 27, 1997 and assigned to the Honorable William L. Standish, District Judge who dismissed the case for failure to state a cause of action under ERISA. On appeal to the Third Circuit Court of Appeals, the appeals court reversed and remanded the case on the grounds that §502(a)(3)(B) which gives the courts authority to award equitable relief for ERISA violations, provides a cause of action for interest on delayed pension benefits. Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974, 165 F.3d

209 (3rd Cir. 1998) (Fotta I).

On remand, following a bench trial, the trial court determined that Plaintiff Fotta was not entitled to relief since he failed to show that the delay in payment of the disability was due to any wrongful conduct of the Fund. The court also denied class certification since the commonality requirement of Federal Rule of Civil procedure 23(a) had not been met.

The Third Circuit Court of Appeals affirmed, ruling that interest can be awarded only if there is a showing that the delay was due to wrongdoing on the part of the fund. As noted in the concurring opinion of Senior District Judge Schwarzer, this holding is contrary to those of other circuits, including the Second Circuit in Dunnigan v. Metropolitan Life Ins. Co, 277 F.3d 223 (2d Cir. 2002) and the Seventh Circuit in Clair v. Harris Trust & Savings Bank, 190 F.3d 495 (7th Cir. 1999) which did not require a showing of wrongdoing or bad faith on the part of the fund. After denial of Plaintiff's request for reconsideration or argument en banc, this request for grant of certiorari follows.

STATEMENT OF FACTS

This action arises under Section 302 of the Labor Management Relations Act, 61 Stat. 163, 29 U.S.C. §186(c)(5) and (e). The complaint essentially makes a claim for loss of interest on a back payment for a disability pension that Fotta received from the Defendant as a result of a mining accident while working for United States Steel Mining Company. He had originally been denied the pension; but in 1994, following culmination of a long battle by Mr. Fotta for workers' compensation benefits, he was determined to have been eligible for the pension from July 24, 1984. Although he received lump sum payments for the back

pension benefits, no payment was made for interest on the back payment. Plaintiff Fotta received a lump sum payment of Eighteen Thousand Eight Hundred and Eighty Five dollars ($18,835.00) representing the back payment from September 1, 1985 to November 30, 1993. He later received an additional lump sum payment of One Thousand Nine Hundred and Sixty Five Dollars ($1,965.00) when the effective date of the pension was set at July 23, 1984, the date of the accident. However, despite demand, the Fund has refused to pay interest on the back payment.

Since this appeal is from the decision of the lower court following a non-jury trial, the relevant facts as determined by the court are set forth in its Findings of Fact and Conclusions of Law which are attached to this Brief at page 25A. These are here incorporated as though fully set forth at length. In addition, it is noted that the parties entered into a Joint Stipulation which was part of the Appendix before the Third Circuit at pp. 278a.[1]

While the procedural history associated with processing this disability pension is detailed and lengthy, the material portions for this appeal are relatively limited. More particularly, appellant draws the attention of the Court to the following findings:

> Finding No. 1: That Fotta did verbally report the mine injury promptly, although no accident report was filed. (p. 26A)
>
> Finding No. 11: When the Funds' clinical consultant concluded, on December 30, 1986 that "Based on Mitchell's report I accept that there was an ankle and

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[1] Page numbers followed by lower case letters designate pages of the Appendix filed in the Court of Appeals for the Third Circuit. Page numbers followed by capital letters designate pages of the Appendix attached hereto.

that it aggravated a pre-existing tumor." establishing the causal link. The consultant only expressed reservations concerning the existence of an injury in the mine and recommended obtaining actual medical records to determine what the claimant told the doctor. (p. 31A)

Finding Nos. 12, 13, 14, 15: That Fotta provided medical documentation establishing his prompt and accurate report of a mine injury to two treating doctors. (pp. 31A-33A)

It is noted that these stipulations were not disputed and should be accepted. A summary of the facts surrounding Fotta's claim was also presented regarding the class action.

Concerning the class action, the following facts were presented to the lower court:

The UMW Trust Fund has established extensive procedures for the guidance of their examiners in resolving the question of whether an individual is entitled to pension payments. Additionally, discovery has revealed the existence of a manual outlining these procedures in greater detail. See Lee Depo. pp. 27,28, App. 57a, 58a. As noted by Mr. Lee, the prime role of the examiner is to collect information. pp. 37,38, App. 67a, 68a; see also paragraph 614.3 of the Manual. Under the procedures, the examiner obtains documentation from the Social Security Administration, the coal employer, the claimant, and independent doctors if necessary. Time is expended in gathering this documentation. For example, it could take a year for Social Security to send the documentation. Lee Depo., p. 17, App. 47a. It could take a year or more for the employer to respond. App. 92a-93a. Independent medical information is obtained only following a process whereby there is an established need to make an

expenditure to acquire the data. Additionally, miscellaneous requests for information can be made directly to the claimant as well as requests for authorizations to release information. Under the regulations, the examiner has the responsibility to push this process forward. Once the disability pension is approved, the funds are to be made payable with an effective date retroactively to the month following the date of disability, with some exceptions relative to the payment of sickness and accident benefits. See Paragraph 413.1 of the Manual.

Additionally, there is some delay associated with the internal appeal process. Currently, approximately 50% of the applications are initially approved. Approximately 5% of the disapproved applications are reversed on internal appeal.

The local district offices have a procedure whereby the various claims are time tracked. App. p. 71a, 72a. However, Mr. Lee was unsure as to whether these time tracking records would still be available and was unable to estimate the average or typical delay associated with the processing of a disability pension by his fund. App. 74a.

Mr. Fotta's claim took the following course: His application was received on or about February 7, 1986 with a letter of acknowledgment from the fund dated February 13, 1986. App. 84a, 85a. Mr. Fotta provided authorizations for medical information to be provided by the Social Security Administration. The fund sent a request for employment and accident information to the employer coal company. App. 90a.

The coal employer responded on or about October 2, 1986, a six month delay, indicating that they did not have an accident report. App. 91a. Social security records were received on or about August 13, 1986. App. 93a. The file does not indicate when the

social security request was made by the Fund. App. 94a.

Notes from the examiner indicate that there was a concern about the absence of an injury report as of December 20, 1986. p. 102a. However, the examiner chose to accept Dr. Mitchell's report linking Fotta's ankle injury to the aggravation of a preexisting tumor. App. 105a. The Fund also obtained medical documentation from Dr. Easley following a request that they issued on March 31, 1987. App. 109a. Dr. Easley's report received July 8, 1987 confirmed that Fotta had visited the Doctor on July 24, 1984 with confirmation of the nearly contemporaneous mine injury. App. 107a,108a. However, despite receipt of this information there is correspondence dated September 30, 1987, indicating that the Fund would deny Fotta's application unless proof of a mining injury was forwarded. A letter of denial was sent out on November 18, 1987. App. 113a.

The Fund's regulations indicate that decisions by worker's compensation judges do not bind the fund. However, they may use such decisions as resources to guide them in their own independent evaluation. The Fund received a referee's decision concerning Fotta on October 6, 1986. App. 115a. In the file, Finding of Fact No. 5 has been circled, apparently by the examiner. p. 86. That finding confirmed that Fotta fell off a motor while in the scope of his employment on or about July 23, 1984 injuring his ankle. However, compensation benefits were denied at that level since the referee did not accept Dr. Mitchell's findings regarding the medical causal link. App. 117a,118a.

Fotta processed an appeal through the workers compensation Appeal Board, the Commonwealth Court, and the Pennsylvania Supreme Court. The Pennsylvania Supreme Court reversed the referee's findings and directed that benefits be provided. The Fund eventually reconsidered their decision and

granted Fotta benefits on or about November 1, 1993, effective to July 23, 1984. The fund refused to make any payment regarding interest despite the delay of approximately nine (9) years.

Fotta believed he had established his entitlement to interest on a prima facie basis as a result of the successful prosecution of an appeal to the Third Circuit Court of Appeals. See Fotta v. Trustees of the UMWA Health and Retirement Fund, 165 F.3d 209 (3d Cir.1998). It must be noted that despite the clear ruling by the Third Circuit that pensioners should be entitled to the payment of interest for delayed pension benefits on equitable principles on a prima facie basis, the Fund continued to refuse to make any interest payment for delayed benefits to any beneficiary despite the acknowledgment that benefits must be paid retroactively to the month after date of disability, however long the process takes.

Members of the Plan are on a computer list, at least since 1990. Lee Depo, App. 60a-63a. Each month a benefit check is processed and mailed to each plan member. Occasionally, notices approved by the Trustees are included in the mailing without substantial additional cost. Computer records exist which can identify the effective date of pension benefits. When benefits were first paid can be ascertained by review of chronologically kept financial records. It is estimated that there are approximately 107,000 pension beneficiaries currently on the roles with approximately 9,000 receiving disability pension benefits. If necessary, specific details of each file including dates associated with information requests and examiner decision-making can be retrieved through microfiche records and paper files in storage.

The lower court was presented with a record of defendants' admitted uniform practice of refusing to pay interest on withheld benefits, despite the clear command of the Third Circuit in Fotta I that interest presumptively should be awarded in these

circumstances, and evidence showing that the persons harmed by this standard practice can be readily identified.

Despite the clear language of Fotta I, the Third Circuit appeared to elevate the standard to establish the remedy in Fotta II, ignoring the Fotta I "presumption" of entitlement and requiring a claimant to establish some form of wrongful withholding.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because there is a split between the circuits on the issue of whether a pension beneficiary should be able to obtain interest on delayed benefits without having to show wrongdoing on the part of the pension plan.

The Third Circuit Court panel below ruled that a beneficiary is presumptively entitled to interest on his delayed benefits only if those benefits were wrongfully withheld or wrongfully delayed. See p. 7 of Opinion, p. 13A below.

However, as noted in the concurring opinion, this position is contrary to that set forth by the Second Circuit in Dunnigan v. Metropolitan Life Ins. Co., 277 F.3d 223 (2nd Cir. 2002) and that of the Seventh Circuit in Clair v. Harris Trust & Savings Bank, 190 F.3d 495 (7th Cir. 1999). It also appears to be contrary to the Third Circuit's earlier ruling in Fotta I, supra, where the appellate court stated:

> We therefore hold that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section 502(a)(3)(B) of ERISA, irrespective of whether the beneficiary also seeks to recover unpaid

> benefits. Because the remedy we recognize here is equitable in nature, its award involves an exercise of judicial discretion. And, like other equitable remedies, it is subject to equitable defenses such as laches, an issue the district court did not consider as it dismissed the complaint on motion. As this case will be remanded for the district court to exercise its discretion, we note that this court has held in other contexts that there is a presumption in favor of awarding interest. See Brock v. Richardson, 812 F.2d 121, 127 (3d Cir. 1997) (holding that award of pre-judgment and post-judgment interest is presumptively granted in backpay cases under the FLSA). In Stroh Container Co.[v. Delphi Industries, Inc., 783 F.2d 743 (8th Cir. 1986)], the Eighth Circuit applied that presumption in an ERISA case, stating that interest "should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable." 783 F.2d at 750. That statement was quoted approvingly by this court in Anthuis [v. Colt Industries Operating Corp., 971 F.2d 999]. 971 F.2d at 1010. **We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed.** (Emphasis added).

165 F.3d. at 214.

In Fotta I, therefore, the presumption was not conditioned on any wrongdoing by the fund, and the Second Circuit cited the Third Circuit as being one who, like them, had held that there was no requirement to show bad faith or wrongdoing on the part of the fund in order to obtain interest. Dunnigan, 277 F.3d at 229-30.

The policy rationale for this position is clear. If the beneficiary was entitled to the benefits, during the period of delay

the fund had the use and value of the money. As noted in Fotta I,

> A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as a result of ERISA litigation. Unjust enrichment principles apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary.

165 F.2d. at 212.

The appeals court further noted:

> As we noted above, payment for the time value of money, when appropriate, is an implicit term of the underlying contractual obligation.

Id. at 214.

Finally, the appeals court had linked its earlier decision to an attempt to effectuate the purposes behind ERISA:

> Rather, we effectuate ERISA's objectives by recognizing, under principles of equity, that beneficiaries should be fully compensated and that any unjust enrichment of plans at beneficiary expense should be avoided.

Id. at 214.

The concurring opinion in Fotta II succinctly summarized the rationale supporting the view that arbitrary conduct is not required to support a cause of action for interest in delayed benefits:

Thus, wrongfulness is an element of the beneficiary's claim only in the sense that the plan's withholding of his money is wrongful in unjustly enriching the plan and depriving the beneficiary. That the court did not intend to condition the cause of action to recover interest on delayed benefits upon proof of a further violation of the plan or of ERISA is confirmed by the court's statement of its rationale:

> The principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns animating our decisions in Schake [v. Colt Industries, 960F.2d 1187 (3d Cir. 1992)] and Anthuis - viz., making the claimant whole and preventing unjust enrichment - are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.
>
> Unjust enrichment principles also apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary.

165 F.3d at 212.

Fotta II, p. 12, p. 18A.

The concurring opinion also noted the rationale of the Second Circuit:

> A case squarely in point not cited by the majority is Dunnigan v. Metropolitan Life Ins. Co., 277 F.3d 223 (2d Cir. 2002). Dunnigan sued on her own behalf and on behalf of a class of similarly situated beneficiaries of MetLife's ERISA plan to recover interest on benefits paid subsequent to the date when the participant was entitled to receive payment. The district court dismissed the action for failure to allege bad faith on the part of MetLife. The court of appeals reversed. It held first that interest may be recovered under §502(a)(3)(B) "[w1hen benefits are paid only after the date on which the beneficiary was entitled to receive them ... [because] the beneficiary has not received the full value of what was promised and, to the same degree, the plan has realized an unjust enrichment (assuming the lateness was unjustified)." 277 F.2d at 229. It then held that no showing of bad faith is required, stating:
>
> > The opinions of the Third and Seventh Circuits have recognized that interest can be appropriate, equitable "make whole" relief under §502(a)(3)(B), without any requirement that a plaintiff allege or prove bad faith on the part of the defendant. See Clair v. Harris Trust & Savings Bank, 190 F.3d 495, 498-499 (7th Cir. 1999) .... Fotta v. Trustees of the United Mine Workers, 165 F.3d 209, 213 (3d Cir. 1998)....
>
> 277 F.3d 229-30. The court went on to state:

> Dunnigan's complaint alleges that she was entitled to disability benefits, and that the payment of those benefits was delayed nearly five years .... [I]t asserts that payment of her benefits was unreasonably delayed and made long after she was entitled to receive them. Such a delay enriches the fiduciary at the expense of the beneficiary. Unless such a delay is justified, we see no reason why it does not constitute a breach of fiduciary duty.

277 F.3d at 230.

pp. 13-14 of Opinion, pp. 19A-20A.

Support for the Plaintiff's position also came from the Seventh Circuit, as noted by the concurrence:

> The majority also cites Clair v. Harris Trust & Savings Bank, 190 F.3d 495 (7th Cir. 1999), yet that case lends no support to its position. While the case was ultimately decided on the merits of the beneficiaries' claims, it had this to say about their entitlement to interest on delayed ERISA benefits:
>
> > The defendants' position would have the odd implication that if the settlement date were June 30, 1990, and the bank did not cut a check to the retiring employee until July 1, 1991, the employee would have no redress, since he would have received his full plan benefits, albeit ten months after the last date on which he was entitled to receive them under the terms of the plan. The violation of the plan would be plain, but there would be no remedy.

190 F.3d at 498 (emphasis added).

p. 14 of the Opinion; p. 20A.

The concurring opinion also noted that the apparent opposing view of the Eighth Circuit was based upon questionable rationale:

> Only one case appears to be in agreement with the majority. In Jackson v. Fortis Benefits Ins. Co., 245 F.3d 748, 750 (8th Cir. 2001), the court affirmed the denial of interest on delayed benefit payments, holding that "a showing [is required] that the plan was breached before interest on the back payments may be awarded under ERISA." It reached that decision on the authority of Clair, Holmes and Fotta I and Dependahl v. Falstaff Brewing Corp., 653 F.2d 1208 (8th Cir. 1981). As the foregoing discussion shows, Clair, Holmes and Fotta I do not support the court's holding; those cases stand for the proposition that an unjustified delay in payment of benefits constitutes a violation of the plan entitling beneficiaries to claim interest. And in Dependahl, the Eighth Circuit awarded prejudgment interest, not on the ground that an ERISA violation had been proved (which was necessarily true since plaintiffs had obtained judgment) but on equitable grounds. Quoting from Hodgson v. American Can Co. , 440 F.2d 916, 922 (8th Cir. 1971), the court said, "From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use." It continued:
>
> We believe these same considerations should be

> followed in an award of prejudgment interest with regard to an ERISA violation. The former executives [plaintiffs] have been denied their contractual severance benefits for a period of approximately four years before final judgment was rendered. Falstaff has continued to have the use of this money. Furthermore, the exact amount of the liability on the plans was never in issue. The only question was whether the employee benefit plan was binding in light of the "just cause" exception. Under these circumstances, an award of prejudgment interest is necessary in order that the plan participants obtain "appropriate equitable relief." 29 U.S.C. § 1132(a)(3)(B).

653 F.2d 1218. Upon analysis, therefore, Fortis provides scant support for the majority's position.

pp. 14-15 of Opinion, pp. 20A-21A.

The majority opinion in this case ("Fotta II") has completely cut back the rationale and legal standard put forward by the opinion in Fotta I. As pointed out by the concurring opinion in Fotta II, a plaintiff seeking interest on delayed pension benefits should receive a legal presumption of entitlement to the interest. Rather than adhering to this standard, the majority in Fotta II has dramatically and drastically reversed the presumption and imposed the high legal standard that a plaintiff would need to prove that pension fund delays are the result of wrongful or arbitrary conduct on the part of the fund. This legal standard effectively destroys the legal remedy for interest since a plaintiff is now forced to conduct a full litigation in the hope of establishing wrongful conduct under circumstances where the likely cost of litigation for all parties will greatly exceed typical interest claims. Under the Fotta I presumption, a much

more modest proceeding would be envisioned, with the plaintiff relying upon presumptive entitlement with the Fund given an opportunity to demonstrate facts suggesting that the grant of interest would be inequitable.

This change of standard and the apparent departure from a equitable presumption in favor of the grant of interest on delayed benefits to a *de facto* policy and standard which eliminates any effective remedy for interest, adopted by Judges Roth and Alito, appears to be at odds with the standard adopted by Judges Sloviter and Scirica (in Fotta I) as well as Judge Schwarzer, sitting by designation as reflected in his concurring opinion in Fotta II.

In view of this apparent split among the Judges, it is respectfully submitted that this Court's consideration is warranted before the rationale in Fotta I is considered implicitly overruled.

This is especially so since this difference of opinion concerning the appropriate legal standard is also reflected in a split of authority among the circuits. As noted in the concurring opinion, cases which hold that there is no bad faith requirement in order to avoid unjust enrichment include Dunnigan, supra, Clair, supra, and Fotta I. Further, as noted by the concurring opinion, an opposing case is Jackson v. Fortis Benefits Ins. Co., supra. It is respectfully submitted that this split of authority requires resolution by the United States Supreme Court.

A recent case, published after Fotta II, demonstrates the danger of allowing the absence of guidance among the circuits to continue. The Eleventh Circuit has sought to deny consideration of interest on delayed benefits entirely. In Flint v. ABB, Inc., 2003 U.S.App. LEXIS 14575 (11th Cir. 2003), the court suggested without holding that the award of interest would be a legal remedy rather than an equitable remedy and hence beyond the purview of

the available ERISA remedies. This severe retrenchment in the developing law was premised upon that circuit's view of this Court's decision in Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204, 151 L.Ed.2d 635, 122 S.Ct. 708 (2002):

> Several circuit courts of appeals--speaking in terms of a fiduciary's "unjust enrichment" (rather than its "wrongful enrichment")-- have held that interest payments on delayed benefits may, in some circumstances, constitute "other equitable relief" within the meaning of § 502(a)(3)(B). See, e.g., Dunnigan v. Metro. Life Ins. Co., 277 F.3d 223, 229-30 (2d Cir. 2002); Jackson v. Fortis Benefits Ins. Co., 245 F.3d 748, 749-50 (8th Cir. 20011; Clair, 190 F.3d at 498-99; Fotta v. Trustees of the United Mine Workers of Am., 165 F.3d 209, 213 (3d Cir. 1998). Most of these cases, however, were decided before Great-West Life &Annuity Insurance Co. v. Knudson, 534 U.S. 204, 151 L. Ed. 2d 635, 122 S. Ct. 708 (2002), in which the Supreme Court's interpretation of "appropriate equitable relief' was more narrow than the interpretations found in previous decisions by the circuit courts of appeals. The Court instructed that, in determining whether relief "is legal or equitable in a particular case (and hence whether it is authorized by § 502(a)(3)) remains dependent on the nature of the relief sought," and the Court resisted plaintiffs' attempt to characterize their claim for enforcement of a reimbursement provision of an ERISA plan as one for equitable restitution. Id. The Court's decision in Knudson, therefore, raises the question whether § 502 (a)(3) ever allows an award of interest for delayed benefits or whether such a claim is an impermissible attempt to dress an essentially legal claim in the language of equity.
>
> This case threatens to disrupt the entire debate regarding the

applicable standard of proof and appears to be based upon a most unfortunate and unsupported reading of Knudson, which clearly did not address the issue presented here.

Knudson itself was a 5-4 decision. Even the majority opinion in Knudson conceded that one of the forms of relief here sought (i.e., the disgorgement of profits earned on the funds held by the previous funds) clearly would be equitable in nature:

> fn2. There is a limited exception for an accounting of profits, a form of equitable restitution that is not at issue in this case. If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered. See 1 Dobbs § 4.3(1), at 588; id.§ 4.3(5)

534 U.S. at 214.

In a society so strongly oriented to the time value of money, where large segments of the middle class are mired in credit card debt as financial institutions are permitted to charge high rates of interest even during periods of near deflation, it is hard to understand the fairness in denying minimal legal interest rates to delayed pension benefits. These benefits are allocated to the most vulnerable members of our society - the aged, the disabled, widows and minors. Since the pension funds unquestionably have the use of the pensioner's money while the process of determining eligibility grinds on, why not release these profits or a similar interest rate to the affected parties? There should be at least some institutional pressure upon the fund to complete, rather than obstruct, the process. As here, the fund knows exactly how to procure the necessary information. It is relatively easy to find some

minor paperwork glitch to deny payment. The vast majority of pensioners will never consult counsel and lack the sophistication to insure perfect compliance with the procedures. A single rule, presumed interest on delayed payments, will end the need for complex litigation and fairly compensate the average individual.

The lower courts apparently fear that pension funds could be adversely impacted if a simple rule were announced that would lend itself to easy class action certification. Clearly, if a uniform simple rule were announced by this Court, issues of commonality, relied upon below to deny the instant class, would disappear. In the short run, until the funds adjusted their administrative procedures to the rule, class actions would be a possibility to compensate for the large number of relatively small claims.

While fairly compensating hard-pressed pensioners, it should not unfairly threaten the funds. If the normal legal interest rate threatens the solvency of a fund, it could simple be asked to disgorge the profits, as is requested here. If there are no profits, there would be nothing to disgorge. If there are profits, they rightfully belong to the pensioners and should not threaten the principal solvency of the fund. In any event, solvency could be raised as a defense to influence the lower court's award, if necessary. Solvency has never been an issue in the record of the instant case.

Finally, on a factual basis, it is noted that the concurring opinion in Fotta II, although acknowledging that the District Court applied the wrong legal standard in denying interest, presumably would have exercised its equitable discretion against the plaintiff, holding the plaintiff responsible for the delay. The concurring opinion relied upon the lower court's rationale in its conclusion of law No. 34, finding the delay in payment was due to plaintiff's failure to provide the fund with an accident report, an employer's

statement or worker's compensation records to establish the occurrence of a mine accident. However, this is inconsistent with the trial court's finding at paragraph 23 of its findings of fact. That finding specifically found that the reason why the Fund determined to reverse its earlier denial of the plaintiff's disability pension was because it had now been able "to establish the existence of a causal link between the mining accident and the disabling diagnosis. The record indicates that although this tumor preexisted the injury, it was asymptomatic and that the trauma from the injury caused this undiagnosed tumor to grow rapidly, causing eventual total disability." See 39A. Since the acknowledged ground for reversing its decision had nothing to do with independent documents establishing the mine accident, but rather dealt solely with the medical causation issue, it is clear that the lower court's conclusion that Fotta's inability to provide a nonexistent accident report or other similar records is not supported by the record and cannot fairly be relied upon to affirm an implied exercise of discretion.

This finding is even more clear in light of the lower court's finding that Fotta did in fact report the accident when it happened. See Finding of Fact No.1, p. 26A.

The majority opinion also criticized Fotta for failing to appeal from the administrative findings. However, Fotta had no further information to offer at the time. The suggestion that the fund reversed itself upon the discovery of a second report referred to in the Pennsylvania Supreme Court ruling strains credulity. As noted earlier, the fund had an internal memo making it clear that it did not doubt medical causation, but doubted the existence of the mine accident. Its later reversal, six years later, was based upon no further information at that point. There was no further information to be had. There was nothing submitted on the crucial issue to an administrative board. Fotta had no further obligation since with no

additional evidence, it would have been futile.

However, the record in this case clearly shows how easy it is for a fund to avoid responsibility in the absence of a clear administrative rule. It seems that under the current state of the law there is no effective way to claim interest on delayed benefits.

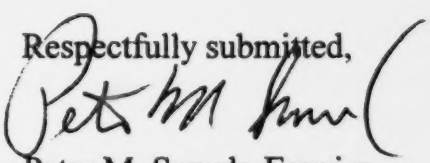
This Court is urged to take a strong and clear position one way or the other. If interest or disgorged profits should be paid on delayed pension benefits, then establish a clear, workable and easily applied rule. If not, then the Court's opinion would do a service to frustrated litigants by simply abolishing the cause of action.

In any event, the Court is urged to grant certiorari to avoid the unfolding judicial anarchy on this issue of substantial importance to the average American pensioner.

CONCLUSION

Petitioners respectfully request that this Court grant the Petition.

Respectfully submitted,



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SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

June 4, 2003

Mr. Peter M. Suwak
Pete's Surplus Building
PO Box I
Washington, DC 15301

Re: Abraham Fotta
v. Trustees of the United Mine
Workers of America, et al.
Application No. 02A1038

Dear Mr. Suwak:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on June 4, 2003, extended the time to and including August 10, 2003.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By
/s/ Clayton R. Higgins, Jr.
Assistant Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

Before: BECKER, Chief Judge, SLOVITER, SCIRICA,
NYGAARD, ALITO, ROTH, MCKEE, RENDELL,
BARRY, AMBRO, FUENTES AND SMITH, Circuit
Judges and SCHWARZER*, District Judge

ORDER

The petition for rehearing en banc filed by the appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision

having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

BY THE COURT,

/s/

_____

Circuit Judge

Dated: Mar 13 2003

*Honorable William W Schwarzer, Senior District Court Judge, who sat on the original panel, is limited to panel rehearing only.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

Submitted Under Third Circuit LAR 34.1(a)
January 14, 2002

Before: ALITO and ROTH, Circuit Judges
SCHWARZER*, District Judge

JUDGMENT

This case came to be heard on the record before the United States District Court for the Western District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on January 14, 2002:

On consideration whereof:

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated March 20, 2001, be and the same is affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: February 11, 2003

PRECEDENTIAL

Filed February 11, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil Action No. 97-cv-00566)
District Judge: Honorable William L. Standish

Submitted Under Third Circuit LAR 34.1(a)
January 14, 2002

Before: ALITO and ROTH, *Circuit Judges*
SCHWARZER,* *District Judge*

(Opinion filed: February 11, 2003)

---

* Honorable William W Schwarzer, Senior District Court Judge for the Northern District of California, sitting by designation.

OPINION OF THE COURT

ROTH, Circuit Judge:

Appellant, Abraham Fotta, is a disabled miner who had to wait nine years to receive his disability payments. He has now received all the delayed payments but has sued his pension fund, claiming that § 502(a)(3)(B) of the Employee Retirement Income Security Act of 1974 (ERISA) entitles him to the interest that would have accumulated on his delayed payments. After a bench trial, the District Court held that Fotta was not entitled to interest because he failed to prove his disability payments were withheld wrongfully. Fotta raises three issues on appeal. First, did the District Court err by requiring Fotta to prove that the withholding of his disability payments was wrongful? Second, if so, did the District Court err when it found that his payments were not wrongfully withheld? Finally, did the District err in denying class certification to Fotta to represent a class of miners who have received delayed disability payments? After careful consideration, we believe that the District Court correctly answered each of these questions and we will affirm its judgment.

I. Factual and Procedural History

On July 23, 1984, Abraham Fotta, while on his job for the United States Steel Mining Company, Inc., stepped off a motor, twisting his ankle and, as has ultimately been determined, aggravating a pre-existing condition. On the day of the injury, Fotta worked through his shift. He told his foreman about the injury, but no accident report was filed. Fotta waited until the following day to visit his employer's physician, Dr. Eisley. Dr. Eisley found that Fotta had a synovial cyst (a type of tumor) in his ankle and referred him to Dr. Mitchell, an orthopedic surgeon. Dr. Mitchell operated to remove the tumor and at the same time treated Fotta for a fractured ankle.

Following the surgery, Fotta's 18 year litigation odyssey began. He first filed a claim for Workmen's Compensation

benefits, which was denied on May 10, 1985. The Workmen's Compensation Referee found that Fotta had failed to prove that the mine accident caused his disability. Based on a report from Dr. Mitchell, the Referee concluded that Fotta's disability was caused by his pre-existing villonodular synovitis (recurring ankle cysts), not his accident. Fotta twice appealed this decision, and the Workmen's Compensation Appeals Board twice affirmed the Referee. Fotta then appealed to the Pennsylvania Supreme Court.

On July 15, 1985, when his second appeal to the Workmen's Compensation Appeal Board was pending, Fotta received some good news. The Social Security Administration had awarded him disability benefits on the basis of a malignant synovial tumor of the right ankle. Fotta was then able to embark on the next phase of his search for disability benefits. On February 7, 1986, he submitted an application for disability benefits to defendant, the United Mine Workers of America Health and Retirement Fund of 1974. The Fund provides disability payments when an applicant proves that (1) he was involved in a mine accident, (2) he received a Social Security Disability Insurance award, (3) he is an employee covered by the plan, and (4) the mine accident caused the disability. *See* Section 615.1.12 of the Fund's Pension Processing Manual. When the cause of the disability is not obvious, a mine accident that "substantially aggravates" a pre-existing condition can fulfill the fourth condition.

The Fund gathered information concerning Fotta's application. It received records from the Social Security Administration, from Fotta's employer, and from Drs. Mitchell and Eisley. The Fund also reviewed records of the Workmen's Compensation proceedings. After considering this information, the Fund informed Fotta, in a letter dated November 18, 1987, that his application had been denied because he did not "establish that [his] disability was caused by a mine accident." The letter also stated that Fotta could call if he had any questions and that, if he was not satisfied that the decision was correct, he could request a hearing within 90 days. Fotta did not take any action in response to this denial of benefits.

Fotta did, however, persist in his Workmen's Compensation appeals. After almost six years of litigation, the Pennsylvania Supreme Court rewarded Fotta's perseverance. On June 1, 1993, the court reversed the Workmen's Compensation Appeal Board and granted Fotta Workmen's Compensation benefits.

Buoyed by this success, Fotta returned to his claim for disability benefits from the Fund. On June 15, 1993, he sent the Fund a copy of the Pennsylvania Supreme Court's decision. The opinion mentioned a letter from Dr. Mitchell that the Fund had not previously seen. The letter stated that "the majority of [Fotta's] disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144, 1146 (Pa. 1993). Despite Fotta's failure to appeal the November 18, 1987, denial of disability benefits, the Fund on November 1, 1993, decided in light of the new information that Fotta had established that a mine accident substantially aggravated his pre-existing ankle cysts and awarded disability benefits to Fotta. The Fund initially awarded him $18,835 in retroactive payments. After adjusting the starting date, the Fund paid him an additional $1,965.

Fotta, however, was not satisfied. He asked the Fund for interest on the retroactive payments. When the Fund declined to pay him interest, Fotta sued the Fund and the individual defendants in the United States District Court for the Western District of Pennsylvania. He alleged that by failing to pay him interest on his retroactive payments, the Fund violated ERISA requirements promulgated at 29 U.S.C. § 1001 *et seq.*

The District Court originally dismissed his law suit for failure to state a claim under ERISA. Fotta appealed. In *Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974*, 165 F.3d 209 (3rd Cir. 1998) (*Fotta I*), we reversed and remanded the case to the District Court. We held that § 502(a)(3)(B), which empowers courts to award appropriate equitable relief to redress violations of ERISA or ERISA regulated plans, provides a cause of action for interest on delayed pension benefits

even when the beneficiary acquired the delayed benefits without resorting to litigation.

On remand, the District Court held a bench trial and concluded that Fotta was not entitled to relief because he had failed to show that the delay in paying his disability was due to any wrongful conduct by the Fund. The District Court also denied Fotta's request for class certification because he had failed to demonstrate that the proposed class met the commonality requirement of Federal Rule of Civil Procedure 23(a). Fotta appealed.

II. Jurisdiction and Standard of Review

Because Fotta sued under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq*, the District Court had federal question jurisdiction under 28 U.S.C. § 1331. We have appellate jurisdiction under 28 U.S.C. § 1291.

The decision to award pre-judgment interest is within the discretion of the District Court, *see Fotta*, 165 F.3d at 214, but we exercise plenary review over its interpretation and application of legal precedent. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3rd Cir. 2000). We review the District Court's decision to deny class certification for an abuse of discretion. *Id.* at 136

III. Discussion

A. The Claim for Interest

Fotta contends that the District Court used the wrong standard to evaluate his claim for interest. He claims in addition that, even if the District Court had applied the correct standard, it erred in finding that he failed to satisfy it.

1. Must Fotta prove that the Fund acted wrongfully?

Fotta's primary claim is that the District Court misapplied § 502(a)(3)(B), using the wrong standard to evaluate his claim for interest. The District Court held that the Fund is liable for interest only if Fotta can show that

the Fund "wrongfully delayed" his disability benefits. Fotta contends that he need not prove the Fund acted wrongfully. He asserts that § 502(a)(3)(B) makes the Fund presumptively liable for interest whenever ERISA benefits are delayed, regardless of the reason.

Section 502(a)(3)(B) allows a beneficiary of an ERISA plan to sue for "other appropriate equitable relief," which we have held includes interest on delayed payments. *See, e.g., Anthuis v. Colt Industries Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992); *Fotta I*, 165 F.3d at 209. Section 502(a)(3)(B) does not, however, allow a beneficiary to sue for equitable relief for any reason, but only "(i) to redress [violations of ERISA or the terms of an ERISA plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan." 29 U.S.C. § 1132(a)(3)(B). As we emphasized in *Fotta I*, § 502(a)(3)(B) "does not . . . authorize appropriate equitable relief *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or enforc[ing] any provisions of ERISA or an ERISA plan.'" *Fotta I*, 165 F.3d at 213 (citing *Mertens v. Hewitt Associates*, 508 U.S. 248, 253 (1993)). Accordingly, an ERISA beneficiary who seeks interest on delayed payments must first prove that those payments were withheld in violation of his ERISA plan or of ERISA itself. *See Jackson v. Fotris Benefits Ins. Co.*, 245 F.3d 748, 749-50 (8th Cir. 2001) (requiring "a showing that the plan was breached before interest on back payments may be awarded under [§ 502(a)(3)(B)]."); *Holmes*, 213 F.3d at 128 (noting that "ERISA permits actions to recover interest on wrongly withheld benefits"); *Clair v. Harris Trust & Sav. Bank*, 190 F.3d 495, 497-99 (7th Cir. 1999) (holding that ERISA "authorizes suit to redress plan violations," but concluding there was no breach of ERISA or terms of the plan); *Anthuis*, 971 F.2d at 1007-08 (upholding an award of prejudgment interest when the plaintiff's severance benefits were withheld in violation of an ERISA plan). We conclude that it is clear from the case law that unless a beneficiary proves his payments were wrongfully withheld, he is not entitled to interest.

Fotta argues that our opinion in *Fotta I* contradicts this rule. Fotta cites a single sentence from that opinion: "We

now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed." *Fotta I* at 214. From this, he argues that interest is presumptively appropriate whenever benefits are delayed whether they are delayed wrongfully or not. There is no reason, however, to believe that *Fotta I* made liability to pay interest independent of wrongdoing.

In fact, *Fotta I* did not even address the issue of liability. It determined who has a cause of action under § 502(a)(3)(B). Before *Fotta I*, only an ERISA beneficiary who had brought a legal action to recover wrongfully withheld benefits could sue for interest under § 503(a)(3)(B). *See, e.g., Anthuis*, 971 F.2d at 1010. In *Fotta I*, we were asked to decide whether a beneficiary who recovered wrongfully withheld benefits without resorting to litigation could sue under § 502(a)(3)(B). *Fotta I*, 165 F.3d at 211. ("This appeal raises an issue of first impression for this court: whether a beneficiary who has been able to receive his her benefits due under an ERISA plan only after considerable delay, but without resorting to litigation to recover that payment, has a cause of action [under § 503(a)(3)(B)]."). We determined that § 503(a)(3)(B) did provide a cause of action for such plaintiffs. We did not, however, address the standard of liability that would trigger an obligation to pay interest.

Because *Fotta I* did not change the standard of liability, the District Court applied the correct standard: a beneficiary is presumptively entitled to interest on his delayed benefits only if those benefits were wrongfully withheld or wrongfully delayed, that is, only if they were withheld or delayed in violation of ERISA or an ERISA plan.

2. Did the Fund Act Wrongfully?

Assuming for the sake of argument that the District Court applied the correct standard, Fotta advances an alternative agument. He urges us to reverse the District Court on the basis that the Fund did wrongfully delay his benefits.

In order to prove the Fund acted wrongfully, Fotta must meet a high standard. The Fund's plan grants the Fund discretion in making eligibility determinations, giving it in

Article VIII.A, B(a) "full and final determination as to all issues concerning eligibility for benefits." Thus, the Fund's eligibility determinations are wrongful only if they are arbitrary and capricious. *See Moats v. UMWA Health & Retirement Funds*, 981 F.2d 685, 687 (3rd Cir. 1992).

The Fund provides disability benefits only when the applicant has carried his burden of proving that a mine accident either directly caused his disability or caused his disability by substantially aggravating a pre-existing condition. When the Fund rejected Fotta's claim for disability benefits on November 18, 1987, it concluded that it had insufficient evidence of a mine accident to conclude that a mine accident had caused Fotta's disability by substantially aggravating a pre-existing condition.

Fotta challenges this holding. Fotta claims that the Fund acted arbitrarily in several ways. He claims that the Fund failed to inform him of the true reason for its denial. Fotta received the November 18, 1987, letter, however, that informed him he did not qualify for benefits, stating "Your application was denied because: You have not established that your disability was caused by a mine accident." This same letter informed Fotta that, if he was not satisfied that this decision was correct, he could request a hearing.

Fotta next claims that the Fund acted arbitrarily and capriciously by failing to ask him for additional medical data or by failing to get more medical data itself. The Fund, however, was diligent in collecting data. It requested medical information from Fotta's employer and examined medical reports from Drs. Mitchell and Eisley. It also examined the records of the Social Security Administration and the findings of the Workmen's Compensation Referee. The Fund's decision to rest on this information would not appear to be arbitrary and capricious.

Fotta also claims the Fund acted arbitrarily and capriciously because it concluded there was no mine accident when it was the fault of Fotta's employer, not of Fotta, that no accident report had been filed. The Fund's Pension Processing Manual, however, permits the establishment of the occurrence of a mine accident by an accident report, an employer statement or Workmen's

Compensation records. Fotta could have demonstrated the occurrence of the mine accident without an "accident report" *per se*, as he ultimately did in the Workmen's Compensation proceedings. The employer's failure to file an accident report did not, therefore, preclude Fotta from receiving benefits.

Fotta finally alleges that the Fund acted arbitrarily and capriciously by "acknowled[ing] the existence of a causal link between some incident and the injury, contrary to the worker's compensation finding." As support for this allegation, Fotta points to a December 30, 1996, note of a Clinical Consultant from the Fund's Central Office that, "Based on Mitchell's report I accept that there was an ankle injury and that it aggravated a pre-existing tumor." Fotta does not go on, however, to cite the remainder of the paragraph which indicates that the consultant was not convinced how the ankle was injured or where. This report is not, therefore, inconsistent with the November 18, 1987, denial of benefits on the basis of lack of evidence that a mine accident caused the disability.

We also note a second reason to uphold the denial of interest. Fotta did not request a hearing to challenge the November 18, 1987, denial of benefits and he waited six years before he presented a renewed request to the Fund for benefits. Section 502(a)(3)(B) allows a plan beneficiary to obtain "appropriate equitable relief" when his benefits have been wrongfully withheld, and, although "interest is presumptively appropriate," *Fotta I* at 214, it remains an equitable remedy subject to the usual conditions. One of the reasons for denying an equitable remedy is delay by the claimant. As the Eighth Circuit has stated, "prejudgment interest should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable. Such circumstances may include bad faith or dilatoriness by the claimant." *Stroh Container Co. v. Delphi Industries, Inc.* 783 F2d 743, 751 (8th Cir. 1986). We conclude from the facts of this case that Fotta's delay in seeking his benefits would make an award of interest inequitable.

B. Denial of Class Certification

Fotta also contends that the District Court abused its discretion by denying his motion for class certification on

the ground that the putative class did not meet the "commonality" requirement of Federal Rule of Civil Procedure 23. Fotta proposed a class of more than 116,000 miners who are receiving or have received disability benefits following some kind of administrative delay. He argues that, because all the members of the class are presumptively entitled to interest, they share a common question of whether interest is available and what the correct rate of interest should be. Because, however, the putative members of the class are not entitled to interest if their benefits were not wrongfully delayed, they do not share common issues of law or fact and thus do not meet the requirements of Rule 23.

A district court can only certify a proposed class if the class meets all four requirements of Rule 23(a) of the Federal Rules of Civil Procedure: numerosity, commonality, typicality, and adequacy of representation. *See* F.R.C.P. 23(a); *In re Prudential Ins. Co. of America Sales Litig.*, 148 F.3d 283, 308-09 (3rd Cir. 1998). Our holding that an ERISA beneficiary is entitled to interest only if the benefits were wrongfully withheld or wrongfully delayed requires us to conclude that the putative class members share no common issues of law or fact. To decide whether each putative class member would be entitled to interest, the District Court would have to determine whether the Fund wrongfully withheld or wrongfully delayed payment for each class member. The District Court would also have to determine the remedy for each class member, an individual determination. As we stated in *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3rd Cir. 2000), a belief that "the interest entitlement of every class member can be calculated using a single, objective formula . . . ignores [*Fotta I*'s] clear holding that interest on delayed ERISA benefits is an equitable remedy dependent upon the individual facts of each claim." *Id.* at 137. Because both liability and the appropriate remedy must be determined for each plaintiff, no common issues of law or fact exist. We cannot, therefore, say that the District Court abused its discretion in denying class certification.

IV. Conclusion

For the reasons stated above, we will affirm the judgment of the District Court.

16A

SCHWARZER, Senior District Judge, concurring:

I concur in the result reached by the majority but write separately because I arrive at that result by a substantially different route. In *Fotta v. Trustees of the United Mine Workers of America, Health and Retirement Fund*, 165 F.3d 209 (3d Cir. 1998) (*Fotta* I), this court held that a fund beneficiary may bring an action under the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001—1461 (ERISA), to recover interest from the plan on benefits paid after some delay. Specifically, we held that ERISA § 502(a)(3)(B), 29 U.S.C. 1132(a)(3)(B), which permits a beneficiary "to obtain other appropriate equitable relief (i) to redress [violations of ERISA or of the terms of an ERISA plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan[,]" provides a cause of action for a beneficiary to recover interest on benefit payments.

The District Court held, and the majority agrees, that to recover interest on delayed payments a beneficiary must prove that benefits were withheld in violation of his ERISA plan or of ERISA itself, i.e., that the denial was arbitrary and capricious. The majority finds support for its position in *Fotta* I, which states, quoting from *Mertens v. Hewitt Associates*, 508 U.S. 248, 253 (1993), that § 502(a)(3)(B) "does not . . . authorize appropriate equitable relief *at large*, but only 'appropriate equitable relief' for the purpose of redress[ing any] violations or enforc[ing] any provisions of ERISA or an ERISA plan." Op. at 6. But the majority fails to quote this court's statement immediately following: "As we noted above, payment for the time value of money, when appropriate, is an implicit term of the underlying contractual obligation. Therefore, an award of interest is an equitable remedy enforcing an ERISA plan provision, albeit an implied one, within the meaning of section 502(a)(3)(B)." 165 F.3d at 213.

Fotta makes clear, therefore, that the delay in payment of benefits to which the beneficiary is entitled is a violation of the plan without more and that recovery of interest enforces the plan. The *Fotta* I court repeatedly and consistently refers to interest to compensate for delay in payment without ever qualifying that the delay must be shown to have been wrongful. Analogizing the instant claim to an

award of prejudgment interest, it explained that "prejudgment interest typically is granted to make a plaintiff whole because the defendant may *wrongly benefit* from use of plaintiff's money," quoting *Schake v. Colt Industries*, 960 F.2d 1187, 1192 n.4 (3d Cir. 1992) (emphasis added); *see also Anthuis v. Colt Industries*, 971 F.2d 999, 1009 (3d Cir. 1992).

Thus, wrongfulness is an element of the beneficiary's claim only in the sense that the plan's withholding of his money is wrongful in unjustly enriching the plan and depriving the beneficiary. That the court did not intend to condition the cause of action to recover interest on delayed benefits upon proof of a further violation of the plan or of ERISA is confirmed by the court's statement of its rationale:

> The principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns animating our decisions in *Schake* and *Anthuis* — *viz.*, making the claimant whole and preventing unjust enrichment — are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.
>
> Unjust enrichment principles also apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary.

165 F.3d at 212.

The majority also cites *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3d Cir. 2000), which considered *Fotta* I, albeit in the context of determining the appropriate rate of interest to be paid on delayed pension benefits. The court, in passing and without discussion, referred to *Fotta* I as holding that a beneficiary was entitled

to interest on "wrongfully withheld benefits" whether recovered through judicial action or through nonjudicial means. *Id.* at 131. In the context of the *Fotta* I rationale, however, which the *Holmes* court adopted, that statement cannot fairly be interpreted as imposing a condition of proof of more than unjustified delay. Thus, the court described "Fotta's two primary justifications for interest awards: (1) ensuring full compensation to the plaintiff; and (2) preventing unjust enrichment," *id.* at 132, and it noted that "Fotta did not impose a requirement of culpability [on the defendant's part . . .]." *Id.* at 133.

A case squarely in point not cited by the majority is *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223 (2d Cir. 2002). Dunnigan sued on her own behalf and on behalf of a class of similarly situated beneficiaries of MetLife's ERISA plan to recover interest on benefits paid subsequent to the date when the participant was entitled to receive payment. The district court dismissed the action for failure to allege bad faith on the part of MetLife. The court of appeals reversed. It held first that interest may be recovered under § 502(a)(3)(B) "[w]hen benefits are paid only after the date on which the beneficiary was entitled to receive them . . . [because] the beneficiary has not received the full value of what was promised and, to the same degree, the plan has realized an unjust enrichment (assuming the lateness was unjustified)." 277 F.2d at 229. It then held that no showing of bad faith is required, stating:

> The opinions of the Third and Seventh Circuits have recognized that interest can be appropriate, equitable "make whole" relief under § 502(a)(3)(B), without any requirement that a plaintiff allege or prove bad faith on the part of the defendant. *See Clair v. Harris Trust & Savings Bank*, 190 F.3d 495, 498-499 (7th Cir. 1999) . . . . *Fotta v. Trustees of the United Mine Workers*, 165 F.3d 209, 213 (3d Cir. 1998). . . .

277 F.3d 229-30. The court went on to state:

> Dunnigan's complaint alleges that she was entitled to disability benefits, and that the payment of those benefits was delayed nearly five years . . . . [I]t asserts that payment of her benefits was unreasonably delayed

> and made long after she was entitled to receive them. Such a delay enriches the fiduciary at the expense of the beneficiary. Unless such a delay is justified, we see no reason why it does not constitute a breach of fiduciary duty.

277 F.3d at 230.

The majority also cites *Clair v. Harris Trust & Savings Bank*, 190 F.3d 495 (7th Cir. 1999), yet that case lends no support to its position. While the case was ultimately decided on the merits of the beneficiaries' claims, it had this to say about their entitlement to interest on delayed ERISA benefits:

> The defendants' position would have the odd implication that if the settlement date were June 30, 1990, and the bank did not cut a check to the retiring employee until July 1, 1991, the employee would have no redress, since he would have received his full plan benefits, albeit ten months after the last date on which he was entitled to receive them under the terms of the plan. *The violation of the plan would be plain*, but there would be no remedy.

190 F.3d at 498 (emphasis added).

Only one case appears to be in agreement with the majority. In *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 750 (8th Cir. 2001), the court affirmed the denial of interest on delayed benefit payments, holding that "a showing [is required] that the plan was breached before interest on the back payments may be awarded under ERISA." It reached that decision on the authority of *Clair*, *Holmes* and *Fotta* I and *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981). As the foregoing discussion shows, *Clair*, *Holmes* and *Fotta* I do not support the court's holding; those cases stand for the proposition that an unjustified delay in payment of benefits constitutes a violation of the plan entitling beneficiaries to claim interest. And in *Dependahl*, the Eighth Circuit awarded prejudgment interest, not on the ground that an ERISA violation had been proved (which was necessarily true since plaintiffs had obtained judgment) but on equitable grounds. Quoting from *Hodgson v. American Can Co.* , 440 F.2d 916,

922 (8th Cir. 1971), the court said, "From the inception of the discrimination, American Can was unjustly enriched and the female employees were damaged. During the entire period American Can has had the use of the money, and therefore equity and justice requires payment by way of interest for its use." It continued:

> We believe these same considerations should be followed in an award of prejudgment interest with regard to an ERISA violation. The former executives [plaintiffs] have been denied their contractual severance benefits for a period of approximately four years before final judgment was rendered. Falstaff has continued to have the use of this money. Furthermore, the exact amount of the liability on the plans was never in issue. The only question was whether the employee benefit plan was binding in light of the "just cause" exception. Under these circumstances, an award of prejudgment interest is necessary in order that the plan participants obtain "appropriate equitable relief." 29 U.S.C. s 1132(a)(3)(B).

653 F.2d 1218. Upon analysis, therefore, *Fortis* provides scant support for the majority's position.

In sum, the authorities (with the questionable exception of Fortis) establish that an ERISA beneficiary makes out a cause of action for interest where payment of benefits has been unjustifiably delayed without proof that the plan's action was wrongful in the sense of arbitrary or capricious. Prejudgment interest is, however, an equitable remedy. "[A]warding prejudgment interest is within the district court's discretion, 'given in response to considerations of fairness and denied when its exaction would be inequitable." *Fotta* I, 165 F.3d at 213 (quoting *Anthuis v. Colt Indus. Operating Co.*, 971 F.2d 999, 1109 (3d Cir. 1992)). The court added that "interest is presumptively appropriate when ERISA benefits have been delayed." 165 F.3d at 214. To the same effect, *see Holmes*, 213 F.3d at 131.

Here, the District Court rejected the interest claim because the delay in payment was due to plaintiff's failure to provide the Fund an accident report, an employer

statement or Workmen's Compensation records to establish the occurrence of a mine accident as required under the Fund's rules. The court found, moreover, that after the Pennsylvania Supreme Court decision which first established plaintiff's eligibility, the Fund promptly processed plaintiff's claim and made a lump—sum payment of the benefits he would have received had he established eligibility at the time of his original application. Thus, the Court implicitly found that the delay was justified. In these circumstances, it could not be said that the District Court abused its discretion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-2097

ABRAHAM FOTTA, individually and
on behalf of all other persons
similarly situated,

Appellant

v.

TRUSTEES OF THE UNITED MINE WORKERS
OF AMERICA, HEALTH AND RETIREMENT FUND
OF 1974; MICHAEL HOLLAND; DONALD
PIERCE; ELLIOT SEGAL;
JOSEPH STAHL, II

ORDER

In order to correct a typographic error in a citation made in the fourth paragraph of Section III. A. 1 of the Court's opinion filed February 11, 2003, it is hereby O R D E R E D that the following text is substituted for that paragraph:

> In fact, Fotta I did not even address the issue of liability. It determined who has a cause of action under § 502(a)(3)(B). Before Fotta I, only an ERISA

beneficiary who had brought a legal action to recover wrongfully withheld benefits could sue for interest under § 502(a)(3)(B). See, e.g., Anthuis, 971 F.2d at 1010. In Fotta I, we were asked to decide whether a beneficiary who recovered wrongfully withheld benefits without resorting to litigation could sue under § 502(a)(3)(B). Fotta I, 165 F.3d at 211. ("This appeal raises an issue of first impression for this court: whether a beneficiary who has been able to receive his her benefits due under an ERISA plan only after considerable delay, but without resorting to litigation to recover that payment, has a cause of action [under § 502(a)(3)(B)]." We determined that § 502(a)(3)(B) did provide a cause of action for such plaintiffs. We did not, however, address the standard of liability that would trigger an obligation to pay interest.

For the Court,

/s/ Marcia M. Waldron
Clerk

Dated: March 28, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
	)	
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL,	)	
	)	
Defendants	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this civil action, plaintiff, Abraham Fotta, seeks interest from defendants, Trustees of the United Mine Workers of America Health and Retirement Fund of 1974 (the Fund), Michael Holland, Donald Pierce, Elliot Segal and Joseph Stahl, under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (ERISA), on a back-:payment of disability pension benefits granted by the Fund to plaintiff.. After a non-jury trial, and based on the findings of fact and conclusions of law that follow, judgment will be

entered in favor of defendants and against plaintiff.[1]

Findings of Fact

1. Prior to July 23, 1984, plaintiff, Abraham Fotta, experienced problems with his right ankle due to villonodular synovitus, which is a type of tumor. On July 23, 1984, while working as a supply motorman at the United States Steel Mining -Company, Inc.'s Maple Creek Mine, plaintiff fell due to an accumulation of condensation, which made the mine surfaces slippery,[2] In the fall, plaintiff injured his right ankle, Despite his injury, plaintiff completed his shift. Although no accident report was filed, plaintiff's foreman was informed about the occurrence of the accident. Plaintiff declined to go to the employer's medical clinic immediately following the accident, opting to see the employer's doctor the next day.

2. On July 24, 1984, plaintiff went to the employer's medical clinic. At that time, plaintiff was seen by Dr. Eisley, who noted swelling in plaintiff's right ankle, but no fracture or dislocation. Dr. Eisley also noted a synovial cyst. Plaintiff was informed that he would not be approved for treatment at the clinic, and that he should see his own doctor. Subsequently, x-rays of plaintiff's right ankle were taken, and he was given crutches. When plaintiff's right ankle failed to improve, he was referred to William J. Mitchell, M.D., an

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[1] In making its findings of fact, the court has taken into consideration the stipulated facts submitted by the parties as Joint Exhibit 6, as well as the testimony offered by the parties during the trial.

[2] United States Steel Mining Company is a subsidiary of USX Corporation.

orthopedic surgeon.

3. On August 24, 1984, plaintiff was seen by Dr. Mitchell, who noted that plaintiff had a fracture just behind the inner condyle of his tibia and a bone cyst on the fibula. On December 3, 1984, Dr. Mitchell removed the tumor on plaintiff's right anklet Plaintiff was hospitalized for two weeks in connection with this surgery.

4. Following his surgery, plaintiff filed a claim for Workmen's Compensation benefits, claiming that his injury was work-related. The claim was denied by a Workmen's Compensation Referee on May 10, 1985. With respect to the medical evidence submitted by plaintiff in support of his claim for Workmen's Compensation benefits, the Referee made the following findings of fact:

* * *

> 4. Claimant submitted a report dated January 4, 1985 of Dr. William J, Mitchell indicating the Claimant had a villonodular synovitis (a type of tumor) which was not caused by trauma and that it was possible that trauma could cause an aggravation of the tumor, which is a; non-malignant tumor and one that can recur locally repeatedly.
>
> * * *
>
> 6. Your Referee finds Claimant's disability is not due to subject incident but is and was due to a non- malignant tumor which pre-existed subject incident, Further, that Claimant failed to prove by unequivocal medical evidence, that subject incident aggravated the pre-existing tumor.

(Joint Exh. 1, p. 42).

5. Plaintiff appealed the Referee's decision to the

Workmen's Compensation Appeal Board, which affirmed the Referee's decision, but permitted plaintiff to resubmit his claim to the Referee for consideration of medical reports by a treating physician, Dr, Mark A. Goodman. Thereafter, plaintiff filed the appropriate petition, and he was granted a new hearing before the Referee, At the second hearing before the Workmen's Compensation Referee, plaintiff testified and offered two medical reports from Dr. Goodman. In addition, plaintiff and the employer each submitted a Report from Dr. Mitchell. Based on the report of Dr. Mitchell submitted to the Referee by the employer, plaintiff's claim for Workmen's Compensation benefits was denied a second time. Once again, plaintiff appealed the denial to the Workmen's Compensation Appeal Board. (Joint Exh. 1, pp. 50-51).

6. On July 15, 1985, plaintiff was awarded disability insurance benefits by the Social Security Administration due to his ankle condition, The transmittal letter from the Social Security Administration indicates that plaintiff's disability began on July 23, 1984, the date of his mine accident. (Joint Exh. 1, p. 23). Thereafter, on February 7, 1986, plaintiff submitted an application for disability pension benefits from the 1974 Pension Plan to the Fund, together with a copy of his Social Security Award Certificate. (Joint Exh. 1, pp. 3-6).

7. Following plaintiff's submission of the application for a disability pension, the Fund submitted a request to the Social Security Administration for plaintiff's file because an award of disability insurance benefits by the Social Security Administration is a prerequisite for disability pension benefits, and a determination in connection with an applicant's eligibility for such benefits cannot be made by the Fund without the applicant's Social Security file.

8. On May 23, 1986, the Workmen's Compensation Appeal Board confirmed the Referee's second denial of plaintiff' s claim for Workmen's Compensation. (Joint Exh, 1, pp. 43-46). In its opinion, the Appeal Board stated in part:

* * *

> In denying the Claimant's petition, the Referee considered the submitted report dated January 4, 1985 of Claimant's medical witness, Dr. William J. Mitchell and concluded that this report failed to prove that the work-related incident aggravated Claimant's pre- existing tumor. The Referee may accept or reject any medical witness, testimony, in whole or in part. Kraemer v. W.C.A.B., 474 A.2d 1236 (1984). Dr. Mitchell does not conclusively find that the trauma suffered by Claimant aggravated the pre-existing tumor; rather, the doctor states that it is "quite possible that it was aggravated by the trauma that occurred to the ankle." The Referee did not err when she concluded that Claimant failed to prove by unequivocal evidence that his disability was the result of the incident at work on July 23, 1984.

* * *

(Joint Exh. 1, pp, 43-46).
Subsequently, plaintiff appealed the Workmen's Compensation Appeal Board decision to the Commonwealth Court of Pennsylvania, and the majority of a divided panel affirmed the Board's decision on October 11, 1990. Plaintiff then filed a petition for allocatur with thePennsylvania Supreme Court, which was granted. (Joint Exh. 1, pp, 50-51).

9. On August 13, 1986, the Fund received plaintiff's - file from the Social Security Administration. In response to the Fund's investigation of plaintiff's entitlement to disability pension benefits, plaintiff's former employer, United States

.Steel Mining Company, Inc., sent a letter to the Fund, informing the Fund that plaintiff did not report the alleged accident to mine officials on the day he claimed it happened; that he did not request medical attention; that he was on the midnight shift, which he completed and went home; that he called the mine the next day to inform his supervisor that he had injured himself the night before at work and would not be in for his shift; that a Referee denied his application for Workmen's Compensation Benefits; and that the denial was upheld by the Workmen's Compensation Appeal Board. The employer also indicated that it did not have any medical information because plaintiff had not submitted any to it. (Joint Exh. 1, p. 47).

10. On November 4, 1986, Carol Headley, a Field Service Representative for the Fund, sent plaintiff's application for a disability pension, together with his file, to Barbara McGeoch, the Manager of the Fund's Field Operations, for a disability narrative. The cover letter states in part: "Attached please find a disability pension application which does satisfy the three criteria (Form #64031) for establishing eligibility. This case is forwarded for preparation of the disability narrative." (Joint Exh. 1, p. 17).

11. On December 30, 1986, a Clinical Consultant from the Fund's Central office prepared the following notes in connection with plaintiff's application for disability pension benefits:

> Alleges mine injury July 23, 1984 - Did not report injury until July 24 when he called and said he would not be on midnite (sic) shift because of July 23 injury -He worked full shift July 23-
>
> Saw a Dr. on July 24, 184 - But no record in file to

validate why or his chief complaint when he went to see Dr.

SS App. For Disability Benefits does not indicate-how he initially injured ankle - only states "injury to ankle" SSA Application does indicate that he was self-employed "cutting grass" -

Since he did not report injury day it occurred, he did work full shift day of alleged injury, there is no mention of how he injured ankle in SSA Application, W.C. does not acknowledge that injury occurred, I believe that we need more evidence to establish that injury to foot & ankle occurred in the mines - only evidence to verify injury is by history noted in one medical report. Based on Mitchell's report I accept that there was an ankle injury and that it aggravated a pre-existing tumor - However, I am not convinced of how ankle was injured or where - need to secure

1) the records (not a report or summary) of his July 24th visit in order to determine the reason for the visit and what he told Dr. about injury.

2) a record (not report or summary) of his 8/24/84 visit to Dr. Wm. Mitchell -

Before final determination can be made -

(Joint Fxh, 1, pp. 12-13).

12. On January 30, 1987, plaintiff provided the Fund with the record of his visit to Dr. Mitchell on August 24, 1984. The record states:

8/24/84

Present condition: The patient reports he fell July 23, 1984 at work in Maple Creek and he reported it to the foreman who apparently said he was not going to report it and didn't.

Was seen by Dr. Eisley at Mon Valley. Had x-rays made, hot soaks, rest, crutches and was advised he had a bone cyst. He comes in today with the ankle still grossly swollen on both sides.

The x-rays show a possible displaced fracture just behind the inner condyle of the tibia and overtop of that is a bone cyst of the fibula. The ankle mortise is intact, however. I suggested we get some Jobst treatment to eliminate the swelling and then re-evaluate the ankle because he states motion is restricted. I told him to stay off it with no weight bearing at all.

Prognosis: Good

Return to Work: Disabled

(Joint Exh. 1, p. 22)

13. On March 31, 1987, Ms. Headley called Dr.

Eisley's office and requested plaintiff's medical records. Dr. Eisley's office declined to provide the medical records, however, because the office did not have a signed release by plaintiff. In addition, the office required a pre-payment of $25.00 for the medical records. (Joint Exh. 1, p. 16).

14. On June 24, 1987, Ms. Headley called plaintiff to explain the situation concerning his medical records. In particular, she explained that the Fund needed a copy of the office notes from his visit to Dr. Eisley on July 24, 1984. In response, plaintiff indicated that he would get the medical records and supply them to the Fund. (Joint Exh. 1, p. 16).

15. On July 8, 1987, the Fund received the medical records from plaintiff. The office notes from his visit to Dr. Eisley on July 24, 1984 state, in part, that plaintiff injured his right ankle at 6:00 a.m. on Monday, July 23 as he stepped off a motor and twisted his ankle. 0n July 9, 1987, Ms. Headley informed Betty Veach, the Director of the Fund's Morgantown Field Service Office, that plaintiff had submitted the records of his visit to Dr. Eisley on July 24, 1984. Plaintiff's file was then forwarded for review to Richard Robinson, the Assistant Director of the Fund's Morgantown Field Service Office. (Joint Exh. 1, p. 15).

16. Section 614.1.12 of the Fund's Pension Processing Manual (the Manual) provides that the following documentation is required for a disability pension: (1) Occurrence of a Mine Accident on a Specific Date Involving the Applicant; (2) Classified Signatory Employment; (3) Social Security Disability (SSDI) Award; and (4) Total Disability as the Result of a Mine Accident. With respect to the first category of required documentation - the occurrence of a mine accident - the Manual indicates that the following

sources of documentation are acceptable: (1) Accident Reports; (2) Employer Statements; and (3) Work Records and/or State Workers' Compensation Records. (Joint Exh. 3).

17. Mr. Robinson reviewed plaintiff's application for disability pension-benefits, together with his file, and concluded that plaintiff failed to satisfy the Manual's first requirement for a disability pension: namely, he failed to establish the occurrence of a mine accident. As a result, Mr. Robinson directed Ms. Headley to contact plaintiff to explain that his application would be denied, unless he provided proof of the accident within 30 days. (Joint Exh. 1, p. 14).[3] By letter dated September 30, 1987, Ms. Headley notified plaintiff that his application for a disability pension would be denied "unless [he] show[ed] proof of the occurrence of a mine injury on July 23, 1984."- (Joint Exh. 1, p. 57).

18. The Fund has prepared and published a series of .Questions and Answers (Q&A) regarding determinations of total disability. Q&A 252 provides in part:

> Subject; DISABILITY PENSION; Mine Accident
> Reference: (50P) II E; (74P) II C, D Trustees Decision

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[3] In this connection, on October 18, 1972, the Fund's Board of Trustees passed Resolution No. 90 which provides, inter alia, that the burden of proving eligibility for benefits from the Fund is on the applicant. (Defendant's Exh. D. p. 10). With respect to hearings on appeals from adverse eligibility decisions, the Fund's Procedures Manual also places the burden of proof on the applicant. (Defendant's Exhs. B, C).

Q. The.1950 and 1974 Benefit and Pension Plans provide benefits to certain persons who are tot4lly disabled as a result of a mine accident, For purposes of these provisions, what test must be met for a finding that a miner was "disabled as the result of a mine accident?"

A. The following three characteristics must be present: (1) Unexpectedness: The disability must have been unlooked for and unforeseen; (2) Definiteness: The disability must be traceable to a definite time, place and occasion which occurred within the course of the mine worker's employment. A progressive disease does not meet this test and therefore cannot be a disability that resulted in a mine accident; (3) Force or impact: The disability must have been caused by the exertion or impact of some external physical force or object against the body or by the exertion or impact of the body against some external physical object; i.e., not simply as a result of the mine worker's own physical condition.

Miners who become disabled under the circumstances described in the following exam.ples can be considered "disabled as the result of a mine accident" under the three tests stated above:

* * *

(b) a miner slips and falls;

* * *

(Defendant's Exh. A, Joint Exh. 2, p. 5).[4]

On November 2, 1987, Ms. Headley prepared a Disability Summary regarding plaintiff's application for disability pension benefits, concluding that, based on the lack of an accident report, plaintiff was not involved in a mine accident that met the criteria of Q&A 252. (Joint Exh. 1, p. 56).

19. On November 18, 1987, Ms. Veach sent the following letter to plaintiff:

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[4] With respect to the issue of whether a miner with a pre-existing condition is "totally disabled as the result of a mine accident," the Fund's Pension Processing Manual Provides in part:

* * *

> **232 Determining the Cause or Causes of the Claimed Disability**. When there are multiple components to a disability and the disability is not due to a single clear mine accident, the resulting disability may still be the result of a mine accident:
>
> a. Pre-Existing Condition. If a condition or injury resulting from a mine accident substantially aggravates or combines with a pre-existing condition or prior injury which did not result from a mine accident, and the miner thereby becomes totally disabled, the miner is considered "totally disabled as the result of a mine accident."

* * *

(Joint Exh. 3, p. 2).

November 18, 1987

Abraham E. Fotta
30 Pine Ridge Road
Lemont Furnace, PA 15456

SS#: 192-18-0115
Dear Mr. Fotta:

We regret to inform you that your application for a disability pension has been denied because you do not meet the eligibility requirements of the 1974 Pension Plan.

Your application was denied because:

You have not established that your disability was caused by, a mine accident. Please contact our office if you disagree with our decision, We will be glad to discuss the eligibility requirements for disability pensions. if you are not satisfied that our decision is correct, you can request a hearing. This request must be filed within 90 days of the date of this letter.

If you have any questions, please do not hesitate to contact our office.

Sincerely,
Betty Veach
Director Morgantown Field Service Office
0286-23

(Joint Exh. 1, p. 58).

Following receipt of Ms. Veach's letter, plaintiff did not

request a hearing on the denial of his application for a disability pension.

20. On June 1, 1993, the Pennsylvania Supreme Court issued a decision reversing the October 11, 1990 judgment of the Commonwealth Court of Pennsylvania, which had affirmed the decisions of the Workmen's Compensation Referee and Appeal Board, (Joint Exh. 1, pp, 48-55). Plaintiff sent a copy of the decision to the Fund on June 15, 1993.[5]

21. On August 12, 1993, based on the decision of the Pennsylvania Supreme Court, another Disability Summary was prepared by the Fund's Morgantown Field Service Office regarding plaintiff's application for a disability pension. (Joint Exh. 1, p, 61). The following day, August 13, 1993, a letter was sent to plaintiff to explain the federal income tax withholding laws, together with a Federal income Tax Withholding Election Form. The letter indicated that an executed copy of this form must be submitted to the Fund before the processing of plaintiff's application could be completed. (Joint Exh. 1, p. 18).

22. On August 25, 1993, M.R. Galusky, a Program Specialist at the Fund's Morgantown Field Service Office, sent a letter to plaintiff's former employer, United States Steel Mining Company, Inc., requesting information concerning plaintiff's work history, including plaintiff's receipt, if any, of Sickness

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[5] The last two pages of the copy of the Pennsylvania Supreme Court's decision that was submitted to the Fund by plaintiff were not part of the decision regarding plaintiff's case. The last two pages of the decision pertaining to plaintiff are missing from the Fund's copy of this document.

and Accident benefits. (Joint Exh. 1, p 76). In response, on August 17, 1993, United States Steel Mining Company, Inc. sent a letter to plaintiff, informing him that he had received Sickness and Accident benefits for the period November 5, 1983 through December 4, 1983, as a result of an injury sustained on November !4, 1983. (Joint Exh, 1, p. 11).

23. On September 29, 1993, Linda DeFuria, a Registered Nurse and Disability Pension Analyst for the Fund, prepared a report concerning plaintiff's application for a disability pension, recommending the plaintiff be awarded a 1974 Plan Pension Disability. The report states in part:

* * *

> ... based upon the aforementioned reasons, a full clinical summary has been waived since I am able to establish the existence of a causal link between the mining accident and the disabling diagnosis. The record indicates that although this tumor pre-existed the injury, it was asymptomatic and that the trauma from the injury caused this undiagnosed tumor to grow rapidly, causing eventual total disability. Therefore, I am able to respond favorably regarding this initial application for a Funds disability pension.

* * *

(Joint Exh. 1, pp. 59-60).

The next day, September 30, 1993, Linda W. Fritz, a Senior Manager in Eligibility Processing for the Fund, concurred with Ms. DeFuria's recommendation. (Joint Exh. 1, p. 60).

24. By letter dated November 1, 1993, Kyu W. Lee, the Assistant Director of the Fund's Eligibility Services, notified plaintiff that his application for a disability pension had been approved with. an effective date of September 1,

1985.[6] A check in the amount of $18,835.00 was enclosed with Mr. Lee's letter. (Joint Exh.: 1, pp. 62, 75).

25. Shortly thereafter, on November 9, 1993, plaintiff filed a Request for Hearing with the Fund.[7] In the request, :plaintiff indicated that he wanted the effective date of his disability pension changed to July 24, 1984, the date of his mine injury and that e wanted interest on the award. (Joint Exh. 1, p, 77). By letter dated January 7, 1994, Karen Caldwell, at Program Assistant at the Fund's Morgantown Field Service Office, notified plaintiff that a pre-bearing conference would be held before the actual hearing on his appeal, and that the pre-hearing conference was scheduled for January 20, 1994. (Joint Exh. 1, p. 78).

26. On January 25, 1994, Ms. Galusky prepared a Pre-Hearing Worksheet in connection with plaintiff's Request for Hearing, setting forth the reasons for the original denial, the issues in dispute, and the type and source of evidence required to support the appeal. (Joint Exh. 1, p. 91). A pre-hearing conference was held the next day, and Ms. Galusky prepared a summary of the conference, indicating that plaintiff had been advised that the Fund would review the

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[6] Following the mine accident, plaintiff was paid Sickness and Accident benefits by United States Steel Mining Company, Inc. from July 24, 1984 to August 19, 1985. Based on plaintiff's receipt of these benefits, it appears that the Fund determined that the effective date of plaintiff's disability pension should be September.1, 198S. (Joint Exh. 1, p. 91).

[7] Although Plaintiff dated the Request for Hearing "November 9, 1994," it is apparent that the request was completed on November ,9, 1993. (Joint Exh. 1, p. 77).

Pennsylvania Supreme Court's decision regarding his claim that the effective date of his disability pension should be July 24, 1984; that there was a possibility that the Fund could 'back date" the effective date of his disability pension; and that no interest would be paid on the award. In response to Ms. Galusky's indication that he would not be paid interest on the award in any event, plaintiff apparently told Ms. Galusky that he would take the Fund to court if his request for interest was denied. (Joint Exh. 1, p. 90).

27. On March 21, 1994, Ms. Galusky prepared a memorandum regarding her contact with plaintiff, The memorandum states that, on March 21, 1994, plaintiff submitted an interlocutory order by the Workmen's Compensation Judge dated January 28, 1994, which (1) directed United States Steel Mining Company, Inc, to pay Workmen's Compensation benefits to plaintiff commencing July 24, 1984 and (2) awarded plaintiff statutory interest at the rate of 10% payable on all deferred Workmen's Compensation payments. The memorandum also states that, based on the Judge's interlocutory order, plaintiff's appeal to change the effective date of his disability pension to July 24, 1984 would be granted. Finally, the memorandum states that no interest could be paid to plaintiff, and that plaintiff intended to pursue his appeal of the interest issue upon receipt of the letter granting his appeal of the effective date of his disability pension. (Joint Exh. 1, p. 93).

28. By letter dated June 28, 1994, plaintiff was notified by Ms. Veach, the Director of the Fund's Morgantown Field Service Office, that, based on the interlocutory order of the Workmen's Compensation Judge, the effective date of his disability pension had been changed. Ms. Veach also states in the letter that the 1974 Pension Plan

did not contain any provision allowing payment of interest on any pension amount in dispute. (Joint Exh. 1, p. 94).

29. By letter dated July 29, 1994, plaintiff was notified by Mr. Lee that, based on the new effective date of his disability pension, the Fund owed plaintiff an additional payment of $1,965,00. (Joint Exh. 1, p. 63). Due to plaintiff's failure to succeed in his appeal of the interest issue with the Fund, he filed this civil action.

Conclusions of Law

30. On September 23, 1997, a memorandum opinion was filed in this case, which, inter alia, dismissed plaintiff's ERISA claim against defendants under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted.[8] On appeal, the United States Court of Appeals for the Third Circuit held, as a matter of first impression, that a beneficiary may bring an action for interest on delayed benefits payments under the section of ERISA allowing actions for "other appropriate equitable relief," irrespective of whether the beneficiary also seeks to recover unpaid benefits in the action, As a result, the Third Circuit reversed the court's decision to dismiss plaintiff's ERISA claim and remanded the case for further proceedings consistent with its opinion. See Fotta v. Trustees of the United Mine Workers of America, Health and Retirement Fund of 1974, 165 F.3d 209 (3d Cir.1998)(Fotta I).

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[8] The court also dismissed plaintiff's state law claims against defendants for lack of subject matter jurisdiction in the September 23, 1997 memorandum opinion. Thereafter, plaintiff abandoned his state law claims.

31. In support of the argument that he is entitled to interest on the lump sum representing monthly disability pension payments back to the date of his mine accident in 1984, plaintiff relies, in large part, on the following statement of the Third Circuit in Fotta I: "... We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed." Id. at 214. Defendants also rely on the Third Circuit's opinion in Fotta I in support of their position that plaintiff has failed to show entitlement to an award of interest. Specifically, defendants maintain that the word "delayed," as used by the Third Circuit in Fotta I, infers a wrongful denial of ERISA benefits, and that, because the evidence in this case does not support a finding that the Fund wrongfully denied disability pension benefits to plaintiff in 1986, he is not entitled to an award of interest.

32. In a memorandum opinion dated October 27, 2000, which was filed in connection with plaintiff's motion for class certification in this case, the court specifically stated that it read Fotta I "as recognizing a cause of action for interest on delayed benefits payments to the extent that the benefits payments were 'wrongfully withheld' or 'wrongfully delayed.'" (Mem. Op., p. 6, 10/27/00). The court then noted the parts of the Fotta I decision, as well as the parts of the Third Circuit's opinion in a later decision, Holmes v. Pension Plan of Bethlehem Steel Corp., 213 F.3d 124 (3d Cir.2000), that supported its reading of the case.[9]

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[9] In Holmes, pension plan participants brought an against the plan administrator under ERISA, seeking, inter alia, interest on pension benefits they received after a decade and a half of delay. The delay was attributable to a mistake by the plan administrator in calculating the monthly benefits due to the

33. After further consideration of these Third Circuit decisions and for the reasons set forth in its October 27, 2000 memorandum opinion, the court again concludes that, to prevail on his claim for interest in this case, plaintiff must show that the Fund "wrongfully withheld" or "wrongfully delayed" the payment of his disability pension benefits. To meet this burden, the court agrees with defendants that plaintiff must show that the Fund's initial denial of his application for a disability pension in 1986 was arbitrary and capricious. See Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 111-15 (1989); Stoetzner v. U.S. Steel Corp., 897 F.2d 115, 119 (3d Cir.1990). Based on the documentation that was before the Fund at the time of the denial, however, the court cannot conclude that plaintiff has met this burden, There simply is no evidence that the Fund's actions in any way contravened the eligibility provisions of the 1974

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plan participants in light of a 1977 amendment to the plan relating to offsets of pension benefits received by a participant from sources other than the plan itself. The plan participants successfully prosecuted their claim for interest on the wrongfully delayed pension benefits in the district court. On appeal, they challenged two equitable limitations the district court placed on the interest it awarded.

Pension Plan.

34. Unlike the situation presented to the district court in Holmes, supra, the "delay" in payment of disability pension benefits to plaintiff was not due to a mistake by the Fund, nor was it due to any other conduct on the part of the Fund that could be characterized as "wrongful." Rather, the "delay" was due to plaintiff's failure to provide to the Fund an accident report, an employer statement or Workmen's Compensation records to establish the occurrence of a mine accident as required by Section 614.12 of the Fund's Pension Processing Manual.[10] Significantly, after receiving the Pennsylvania Supreme Court's June 1, 1993 decision, which reversed the determination of the Workmen's Compensation Referee and Appeal Board that plaintiff had not suffered a work-related injury on July 23, 1984 in connection with his ankle condition, the Fund promptly processed plaintiff's application for disability pension benefits and made a lump sum payment to plaintiff for the benefits he would have received if he had established his eligibility for such benefits at the time of his original application in 1986. Under the circumstances, judgment will be entered in favor of defendants and against plaintiff.

An order follows.

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[10] As noted in footnote 3, the burden of proving eligibility for pension benefits from the Fund was on plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
	)	
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL,	)	
Defendants	)	

ORDER

AND NOW, this 29th day of March, 2001, in accordance with the foregoing findings of fact and conclusions of law, it is hereby ORDERED as follows:

1. Judgment is entered in favor of defendants, Trustees of the United Mine Workers of American Health and Retirement Fund of 1974, Michael Holland, Donald Pierce and Joseph Stahl, and against Plaintiff, Abraham Fotta.

2. The Clerk shall mark this case closed.

William L. Standish
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA,	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
	)	
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL,	)	
Defendants	)	

MEMORANDUM

I

In this civil action brought pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (ERISA), plaintiff, Abraham Fotta, seeks interest from defendants, Trustees of the United Mine Workers of America Health and Retirement Fund of 1974 (the Fund), Michael Holland, Donald Pierce, Elliot Segal and Joseph Stahl, on a back-payment of. disability pension benefits granted by the Fund to plaintiff.[1]

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[1] Plaintiff's amended complaint asserts two state law claims in addition to the ERISA claim remaining before the court, By memorandum and order dated September 23, 1997, the court dismissed plaintiff's ERISA claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and dismissed

Presently before the court is plaintiff's motion for class certification. For reasons that follow, the court will deny plaintiff's motion.

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without prejudice his state law claims for lack of subject matter jurisdiction.
Plaintiff appealed the dismissal of his ERISA claim. Defendants also appealed, seeking dismissal of plaintiff's state law claims with prejudice.
In Fotta v. Tr. of United Mine Workers, 165 F.3d 209 (3d Cir. 1998), the United States Court of Appeals for the Third Circuit reversed the court's dismissal of plaintiff's ERISA claim and declined to consider defendants' arguments regarding their appeal because plaintiff had indicated that he would not pursue his state law claims in the event that the Third Circuit reinstated his ERISA claim, As a result, only plaintiff's ERISA claim remains.

II

A court cannot certify a proposed class if the proposed class does not satisfy the four prerequisites of Rule 23(a) of 2 the Federal Rules of Civil Procedure.[2] However, satisfaction of the four prerequisites is a necessary but not sufficient condition to class certification: a proposed class must also "fit within one of three categories of class actions defined in Rule 23(b)."[3] In Re Prudential Ins. Co. of American Sales Litig.,

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[2] Rule 23(a) provides as follows:

> (a) Prerequisites to a Class Action. One or .more members of a class may sue or be sued as representative parties on behalf of all only .if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P, 23(a). The four prerequisites are commonly referred to as "numerosity, commonality, typicality and adequacy of representation." E.g., In re Prudential Ins. Co. of America Sales Litig., 148 F.3d 283, 308-09 (3d Cir. 1998).

[3] Rule 23(b) provides as follows:

> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with

respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the, controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed.R.Civ. P. 23(b).

148 F.3d 283, 309 (3d Cir. 1998).

III

Plaintiff moves for certification of a class "consisting of persons and/or claimants and/or beneficiaries who have been denied interest on delayed payments from the [Fund.]" (Motion at 1). Plaintiff indicates that the class may be comprised of the following three sub-classes: (1) "[a]pproximately 450 persons who appealed the initial denial of benefits successfully following administrative and appellate delay[;]" (2) "[a]pproximately 9,000 persons :who are,receiving disability benefits following administrative delay[;]",, and, (3) "[a]pproximately 107,000 persons who are receiving various pension benefits following administrative delay." (motion at 2).

Defendants do not dispute that plaintiff's proposed class meets the numerosity and adequacy of representation requirements of Rule 23(a). Although defendants dispute plaintiff's contention that the proposed class satisfies the rule's remaining requirements, commonality and typicality, the court need only consider the requirement of commonality because a determination regarding that requirement is dispositive of plaintiff's motion.

"The commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." In re Prudential Ins. Co. of America Sales Litig., 148 F.3d at 310 (citation omitted). Plaintiff insists that "the principal, controlling issues in this case are uniform, classwide questions" and asserts the existence of three such issues: (1) availability of interest; .(2) rate of interest; and (3) applicable period of time. (Br. at 8). (See Br. at 10).

Couched in different terms, plaintiff argues that the issues of liability and remedy are essentially "uniform, classwide questions." Plaintiff's argument is without merit.

In Fotta v. Tr. of United Mine Workers, the Third Circuit stated as follows:

> We therefore hold that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section 502(a)(3)(B) of BRISA, irrespective of whether the beneficiary also seeks to recover unpaid benefits. Because the remedy we recognize here is equitable in nature, its award involves an exercise of judicial discretion. And, like other equitable remedies, it is subject to equitable, defenses such as laches . . . .
>
> * * *
>
> We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed.

165 F.3d 209, 214 (3d Cir. 1998).

In its holding, the Third Circuit did not refer to "wrongfully withheld" or "wrongfully delayed" benefits payments. Nonetheless, the court reads Fotta as recognizing a cause of action for interest on delayed benefits payments to the extent that the benefits payments were "wrongfully withheld" or "wrongfully delayed."

Several parts of the Fotta decision support the court's reading. In explaining the rationale for the recognition of prejudgment interest is an ERISA suit to-recover benefits due, the Third Circuit stated that "[t]o allow the Fund to

retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further, the relief granted would fall short of making [the claimant] whole because he has been denied the use of money which was his." Fotta, 165 F.3d at 212 (citation omitted). The Third Circuit continued thus:

> The principles justifying prejudgment interest also justify an award of interest whore benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns [of] making the claimant whole and preventing unjust enrichment . . . are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.

Id. (emphasis added).

The Fotta decision also contains the following statements:

> Fotta's complaint, accepted as true for present purposes, seeks interest as a compensatory remedy - that is, to compensate him fully for the Trustees' several-year-long delay in discharging their contractual responsibility to Fotta. Interest for late payment has long been regarded as an implicit part of a contractual obligation to pay money. This principle was recognized by the Supreme Court more than a century ago: "Every one who contracts to pay money

> on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties."

Id. at 213 (citation omitted)(emphasis added).

Finally, the Third Circuit stated that " . . . the awarding of interest where benefits have been unjustifiably delayed not only ensures full compensation, but also serves to prevent unjust enrichment." Id. (emphasis added).

The concurring opinion of Circuit Judge Alito also supports the court's reading. Circuit Judge Alito st@ited as follows:

> I am in general agreement with the opinion of the court. Under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), an ERISA beneficiary may bring a civil action "to obtain other appropriate equitable relief . . . to redress" a violation of the plan. If the plaintiff in this case can establish that the trustees violated the plan by failing to pay his benefits on time, an award of interest would constitute "appropriate equitable relief."

Id. at 215.

In addition to the foregoing support, the court's reading is still further supported by a recent decision of the Third Circuit. In Holmes v. Pension Plan of Bethlehem steel Corp., the Third Circuit twice characterized Fotta as holding "that ERISA permits actions to recover interest on wrongly withheld benefits even where the benefits were paid

before litigation." 213 F.3d 124, 128: 130 (3d Cir. 2000)(emphasis added). The Third Circuit also explained its Fotta decision as follows.

> In Fotta, we held that a beneficiary may bring an action under ERISA against a pension .plan "to recover interest on benefits the plan .paid after some delay, but without the beneficiary having sued under ERISA" to recover the benefits themselves. In earlier decisions, we had already recognized that prejudgment interest was available where the beneficiary had brought suit under ERISA to recover unpaid benefits.
>
> Those earlier decisions were based on recognition of the fact that
>
> > "[t1o allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further the relief granted would fall short of making [the claimant] whole because he has been denied the use of the money which was his."
>
> Those principles applied, we held in Fotta, whether the beneficiary ultimately recovered the wrongfully withheld benefits through judicial action, or through non-judicial means.

Holmes, 213 F.3d at 131 (citations omitted)(emphasis added).

Thus, the nature of plaintiff's ERISA claim for interest is clear. Equally clear is that a determination of liability on that claim and selection of an appropriate remedy must proceed on a case-by-case basis.

In Holmes, two named plaintiffs sought recovery of

interest on benefits payments that had been wrongfully delayed. Id. at 129-30. The two named plaintiffs also sought to certify a proposed class described thus:

> All persons., including beneficiaries, who are or were entitled to pension benefits under the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies whose benefits were delayed, reduced or denied by the Plan for more than 90 days and who have received or will receive a retroactive payment by the Plan of such withheld pension benefits.

Id. at 135. Although the named plaintiffs were successful on their ERISA claim for interest, the district court denied certification of the proposed class on the ground that the proposed class was overbroad and ill-defined. Id. at 128, 137.

In affirming the district court's denial of certification of the proposed class, the Third Circuit stated as follows:

> . . . Appellants appear to believe that the interest entitlement of every class member ,can be calculated using a single, objective, formula, and that the parties, not the court, would be responsible for performing the requisite calculations. Such a belief, ignores Fotta's clear holding that interest on delayed ERISA benefits is an equitable remedy dependent upon the individual. facts of each claim. Thus, there is no single, objective formula for calculating each class member's interest entitlement. Moreover, it is the province of the court, not the parties, to balance the equities in each claim.
>
> * * *
>
> As already noted, the issue of liability itself requires

> an individualized inquiry into the equities of each claim.

Id. at 137-38.

The court can conceive of no reason why the Holmes rationale is inapplicable in the present case. In light of the foregoing, the court concludes that plaintiff has failed to demonstrate that the proposed class satisfies the commonality requirement of Rule 23(a). Accordingly, the court will deny plaintiff's motion for class certification.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ABRAHAM FOTTA, Plaintiff,	)	
	)	Civil Action
v.	)	No. 97-566
TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974, MICHAEL HOLLAND, DONALD PIERCE, ELLIOT SEGAL, and JOSEPH STAHL, Defendants	)	

ORDER

AND NOW, this 27th day of October, 2000, in accordance with the foregoing memorandum, it is hereby ORDERED that the motion of plaintiff, Abraham Fotta, for class certification (document no. 37) be, and hereby is, denied.

William L. Standish
United States District Judge

Filed December 18, 1998

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 97-3619

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

Appellant/Cross-Appellee

v.

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974; MICHAEL H. HOLLAND; DONALD E. PIERCE; ELLIOTT A. SEGAL; JOSEPH STAHL, II,

---

No. 97-3663

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

v.

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA, HEALTH AND RETIREMENT FUND OF 1974; MICHAEL HOLLAND; DONALD PIERCE; ELLIOTT SEGAL; JOSEPH STAHL, II,

TRUSTEES OF THE UNITED MINE WORKERS OF AMERICA 1974 PENSION TRUST; MICHAEL HOLLAND; DONALD PIERCE; ELLIOTT SEGAL and JOSEPH STAHL,

Appellees/Cross-Appellants

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Civil No.: 97-cv-00566)

Argued September 15, 1998

Before: SLOVITER, SCIRICA and ALITO, *Circuit Judges*

(Filed: December 18, 1998)

Peter M. Suwak (Argued)
Washington, PA 15301

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Attorneys for Appellees/Cross-Appellants

OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

This appeal calls upon us to decide whether the beneficiary of an employee plan may bring an action under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA") against the plan to recover interest on benefits the plan paid after some delay, but without the beneficiary's having sued under ERISA for the benefits. Relying on both ERISA and state-law theories, Abraham Fotta brought such an action against the Trustees of the United Mine Workers of America Health and Retirement Fund of 1974 ("the Trustees"). The district court dismissed the ERISA count for failure to state a claim upon which relief may be granted and dismissed the pendent state claims without prejudice. Fotta appeals the dismissal of the

ERISA count and the Trustees cross-appeal to have the state claims dismissed with prejudice.

I.

Fotta's complaint alleges the following: While employed as a miner, Fotta was covered by a United Mine Workers-administered pension plan that provided, among other things, disability insurance. Fotta suffered a work-related injury on July 24, 1984, rendering him totally and permanently disabled. A considerable time after the injury, and only after the Pennsylvania Supreme Court upheld the causal relationship between Fotta's work and his disability under the Pennsylvania Workmen's Compensation Act, *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144, 1147 (Pa. 1993), the Trustees granted Fotta disability benefits, with an effective date of September 1, 1993. The Trustees, however, later revised this effective date and granted Fotta disability benefits effective August 1, 1984. Accordingly, Fotta received a lump-sum back payment of $21,600 reflecting disability benefits from August 1, 1984, to September 1, 1993. Fotta then demanded interest on this back payment, which the Trustees refused.

Fotta sued the Trustees in the district court for the Western District of Pennsylvania. The three-count complaint seeks recovery under ERISA and, alternatively, under state-law theories of breach of contract and unjust enrichment. The Trustees moved to dismiss, arguing that the first count failed to state a claim under ERISA and that the remaining state-law counts were preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a). The district court dismissed the ERISA count for failure to state a claim and then dismissed the remaining state-law counts without prejudice under 28 U.S.C. § 1367, stating that there was no longer federal jurisdiction over the case. We exercise plenary review over the district court's grant of a motion to dismiss. *Weiner v. Quaker Oats Co.*, 129 F.3d 310, 315 (3d Cir. 1997).

II.

This appeal raises an issue of first impression for this court: whether a beneficiary who has been able to receive his or her benefits due under an ERISA plan only after

considerable delay, but without resorting to litigation to recover that payment, has a cause of action under ERISA. None of the other circuits has yet addressed the issue either. The district courts that have addressed the question are divided: two have held such claims for interest non-cognizable under ERISA, *see Devito v. Pension Plan of Local 819 I.B.T. Pension Fund*, 975 F. Supp. 258 (S.D.N.Y. 1997); *Scott v. Central States Pension Plan*, 727 F. Supp. 1095 (E.D. Mich. 1989), and one has ruled that ERISA does provide a cause of action for interest, *see Hizer v. General Motors Corp.*, 888 F. Supp. 1453 (S.D. Ind. 1995).

Fotta invokes two of ERISA's civil-enforcement provisions, sections 502(a)(1)(B) and 502(a)(3)(B), codified at 29 U.S.C. §§ 1132(a)(1)(B) and 1132(a)(3)(B) respectively. The first of these provisions, section 502(a)(1)(B), is the means by which an ERISA plan beneficiary is authorized to sue to recover benefits under the plan. This subsection states in relevant part: "A civil action may be brought . . . by a participant or beneficiary . . . to recover benefits due to him under the terms of his plan [or] to enforce his rights under the terms of the plan . . . ." The second of these provisions, ERISA section 502(a)(3)(B), permits a plan beneficiary "to obtain other appropriate equitable relief (i) to redress [violations of ERISA or of the terms of an ERISA plan] or (ii) to enforce any provisions of this subchapter or the terms of the plan."

The Trustees emphasize, and Fotta acknowledges, that Congress has not explicitly provided a cause of action for interest on delayed benefits payments. The parties further agree that no provision in the plan itself specifically establishes Fotta's entitlement to interest. The Trustees contend that because neither the statute nor the plan expressly provides for the relief that Fotta seeks, Fotta's claim must fail.

A.

We disagree with the Trustees' contention that the lack of an express provision for interest in ERISA is necessarily fatal to Fotta's claim. In enacting ERISA, Congress intended for the judiciary to develop a body of federal law "to deal with issues involving rights and obligations under private

welfare and pension plans." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987) (quoting 120 Cong. Rec. 29,942 (1974) (statement of Sen. Javits)). This is, of course, not a boundless grant of authority; the development of federal common law under ERISA is appropriate only when "necessary to fill in interstitially or otherwise effectuate the statutory pattern enacted in the large by Congress." *Bollman Hat Co. v. Root*, 112 F.3d 113, 118 (3d Cir. 1997) (quotation marks and citation omitted). Accordingly, we must first determine whether recognition of a cause of action for interest under one of ERISA's enforcement provisions is a proper exercise of the court's power to develop the law of remedies under ERISA.

It is of considerable moment that we have previously recognized that a beneficiary may seek prejudgment interest in a suit to recover benefits due, notwithstanding the lack of an express directive from Congress to that effect. In *Schake v. Colt Industries Operating Corp. Severance Plan for Salaried Employees*, 960 F.2d 1187, 1192 n.4 (3d Cir. 1992), we acknowledged, albeit in passing, that prejudgment interest was available in actions to recover benefits under ERISA (although we ultimately found that the claimant's failure to timely request such interest deprived the court of jurisdiction to award interest). We reiterated and amplified this ruling in *Anthuis v. Colt Industries Operating Corp.*, 971 F.2d 999, 1010 (3d Cir. 1992). What is even more significant, we did so while acknowledging that ERISA does specifically provide for prejudgment interest in another class of actions—lawsuits to recover delinquent employer contributions under 29 U.S.C. § 1132(g)(2)(B). *Id.* at 1009. "In recognizing the availability of a discretionary award of prejudgment interest in *Schake* and *Anthuis*, we embraced the Eighth Circuit's reasoning in *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir. 1986), and *Short v. Central States Pension Fund*, 729 F.2d 567 (8th Cir. 1984). In the latter case, the court set forth the rationale for the recognition of prejudgment interest: "To allow the Fund to retain the interest it earned on funds wrongfully withheld would be to approve of unjust enrichment. Further, the relief granted would fall short of making [the claimant] whole because he has been denied the use of money which was his." *Short*,

729 F.2d at 576. Adopting these precepts, we held in *Schake*, and reiterated in *Anthuis*, that "prejudgment interest typically is granted to make a plaintiff whole because the defendant may wrongfully benefit from use of plaintiff's money." *Schake*, 960 F.2d at 1192 n.4; *Anthuis*, 971 F.2d at 1009.

The Trustees do not take issue with the holdings in these cases. On the contrary, they approve the cases where the courts have awarded prejudgment interest when tied to an underlying judgment on the merits, notwithstanding the lack of explicit statutory authority for such interest. Instead, the Trustees seek to distinguish the award of prejudgment interest in the circumstance where benefits have been recovered from that where the beneficiary brings an independent action solely to recover the interest, arguing that the claim for benefits is expressly provided in section 502(a)(1)(B). This was essentially the position of the district courts in *Devito* and *Scott*.

We believe the distinction is unpersuasive. The principles justifying prejudgment interest also justify an award of interest where benefits are delayed but paid without the beneficiary's having obtained a judgment. The concerns animating our decisions in *Schake* and *Anthuis*—*viz.*, making the claimant whole and preventing unjust enrichment—are not diminished merely because the plan has paid the overdue benefits without the claimant having resorted to litigation to secure payment. A late payment of benefits effectively deprives the beneficiary of the time value of his or her money whether or not the beneficiary secured the overdue benefits through a judgment as the result of ERISA litigation.

Unjust enrichment principles also apply with equal force in this setting. To hold that the absence of a judgment deprives the injured beneficiary of the time value of his or her money would create a financial incentive for plans to delay payment and thus retain interest that rightfully belongs to the beneficiary. *Accord Hizer*, 888 F. Supp. at 1461.

B.

We are also unpersuaded by the Trustees' argument that Fotta's claim for interest is not cognizable because it is one

that seeks "extracontractual damages" within the contemplation of the Supreme Court's opinion in *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134, 144 (1985). Indeed, *Russell* was the principal basis for the district court's denial of interest in this case. To be sure, the *Russell* Court rejected a beneficiary's effort to invoke ERISA's fiduciary obligations as a means of recovering damages arising from delayed benefits. In so doing, however, the *Russell* Court held no more than that the civil-enforcement provision relating to breaches of fiduciary duty does not provide the claimant with a cause of action for consequential and punitive damages. The court expressly reserved the issue whether any of ERISA's other civil-enforcement provisions might authorize the kind of relief sought in *Russell*: "Because respondent relies entirely on § 409(a), and expressly disclaims reliance on § 502(a)(3) [permitting an action for "other appropriate equitable relief"], we have no occasion to consider whether any other provision of ERISA authorizes recovery of extracontractual damages." 473 U.S. at 139 n.5.

Moreover, we do not find that an interest claim is "extracontractual" within the intendment of the *Russell* opinion. Unlike the plaintiff in *Russell*, Fotta is not seeking consequential or punitive damages. Fotta's complaint, accepted as true for present purposes, seeks interest as a compensatory remedy—that is, to compensate him fully for the Trustees' several-year-long delay in discharging their contractual responsibility to Fotta. Interest for late payment has long been regarded as an implicit part of a contractual obligation to pay money. This principle was recognized by the Supreme Court more than a century ago: "Every one who contracts to pay money on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest as damages for his nonperformance. Hence it may correctly be said that such is the implied contract of the parties." *Spalding v. Mason*, 161 U.S. 375, 396 (1896) (internal quotation marks omitted). And more recently, the Court noted that "prejudgment interest traditionally has been considered part of the compensation due plaintiff." *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989).

Consequently, we find that a cause of action for interest on delayed benefits payments is not foreclosed by either the

terms of ERISA or the terms of the plan. We further conclude that section 502(a)(3)(B) of ERISA—allowing a beneficiary to sue for "other appropriate equitable relief . . . to enforce any provisions of this subchapter or the terms of the plan"—is the appropriate vehicle for such a cause of action. This conclusion is consistent with our holding in *Anthuis* that the awarding of prejudgment interest under ERISA is within the district court's discretion, "given in response to considerations of fairness and denied when its exaction would be inequitable." 971 F.2d at 1009 (alteration and quotation marks omitted). Indeed, prejudgment interest is generally recognized as an equitable remedy in other legal contexts. *See Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557, 574 (3d Cir. 1998) (Prejudgment interest is an equitable remedy under New Jersey law.); *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 616 (3d Cir. 1991) ("When deciding whether to award prejudgment interest to a party, a court must consider 'whether countervailing equitable considerations militate against such a surcharge.' ").

Hence, Fotta's claim for interest is appropriately raised under Section 502(a)(3)(B), the civil-enforcement provision relating to equitable relief.[1] In this regard, the Trustees' argument that an interest award cannot be equitable because it is an award of money (as opposed to an injunction) misses the mark. As noted above, the awarding of interest where benefits have been unjustifiably delayed not only ensures full compensation, but also serves to prevent unjust enrichment. Restitution—the traditional remedy for unjust enrichment—is widely, if not universally, regarded as a tool of equity. *See Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (Money damages are considered equitable when "they are restitutionary."); *Porter v. Warner Holding Co.*, 328 U.S. 395, 402 (1946) (differentiating, under the Emergency Price Control Act of 1942, between statutory damages at law and restitutionary relief falling within the statutory grant of equity jurisdiction).

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1. Although we do not reject section 502(a)(1)(B) as providing a possible statutory bases for such a claim, we need not reach the issue in light of our decision.

In reaching this conclusion, we are mindful that the Supreme Court has shown an "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens v. Hewitt Associates*, 508 U.S. 248, 254 (1993) (quoting *Russell*, 473 U.S. at 146-147). But in recognizing that an action for interest may be maintained as an action for "other appropriate equitable relief" under ERISA, we do not run afoul of this caution. To be sure, section 502(a)(3)(B) "does not . . . authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or ... enforc[ing] any provisions' of ERISA or an ERISA plan." *Mertens*, 508 U.S. at 253 (brackets in original). As we noted above, payment for the time value of money, when appropriate, is an implicit term of the underlying contractual obligation. Therefore, an award of interest is an equitable remedy enforcing an ERISA plan provision, albeit an implied one, within the meaning of section 502(a)(3)(B).

In sum, by permitting this action to go forward, we are not "engraft[ing] a remedy on a statute . . . that Congress did not intend to provide." *Russell*, 473 U.S. at 145 (internal quotation marks omitted). Rather, we effectuate ERISA's objectives by recognizing, under principles of equity, that beneficiaries should be fully compensated and that any unjust enrichment of plans at beneficiaries' expense should be avoided.

We reject the Trustees' argument that we are without authority to recognize Fotta's claim. To the contrary, ERISA requires that we develop the law of ERISA so as to define the proper remedial scope of the statute. *See Russell*, 473 U.S. 134, 157 (Brennan, J., concurring) ("ERISA was *not* so 'carefully integrated' and 'crafted' as to preclude further judicial delineation of appropriate rights and remedies; far from barring such a process, the statute explicitly directs that courts shall undertake it."); *Teamsters Pension Trust Fund of Philadelphia & Vicinity v. Littlejohn*, 155 F.3d 206, 208 (3d Cir. 1998) ("In a situation where the statute does not provide explicit instructions, it is well settled that

Congress intended that the federal courts would fill in the gaps by developing, in light of reason, experience, and common sense, a federal common law of rights and obligations imposed by the statute.").

We therefore hold that a beneficiary of an ERISA plan may bring an action for interest on delayed benefits payments under section 502(a)(3)(B) of ERISA, irrespective of whether the beneficiary also seeks to recover unpaid benefits. Because the remedy we recognize here is equitable in nature, its award involves an exercise of judicial discretion. And, like other equitable remedies, it is subject to equitable defenses such as laches, an issue the district court did not consider as it dismissed the complaint on motion. As this case will be remanded for the district court to exercise its discretion, we note that this court has held in other contexts that there is a presumption in favor of awarding interest. *See Brock v. Richardson*, 812 F.2d 121, 127 (3d Cir. 1997) (holding that award of pre-judgment and post-judgment interest is presumptively granted in back-pay cases under the FLSA). In *Stroh Container Co.*, the Eighth Circuit applied that presumption in an ERISA case, stating that interest "should ordinarily be granted unless exceptional or unusual circumstances exist making the award of interest inequitable." 783 F.2d at 750. That statement was quoted approvingly by this court in *Anthuis*. 971 F.2d at 1010. We now make explicit that interest is presumptively appropriate when ERISA benefits have been delayed.

III.

In their cross-appeal, the Trustees urge that the district court erred in dismissing Fotta's state-law claims without prejudice for lack of subject matter jurisdiction. The Trustees contend that the court continued to have federal question jurisdiction over those claims by virtue of the "complete preemption" doctrine. *See Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 354 (3d Cir. 1995) (explaining complete preemption). Furthermore, the Trustees urge that the state-law counts should be dismissed with prejudice because they are preempted by section 514(a) of ERISA, 29 U.S.C. § 1144(a). The Trustees' arguments may have merit. But because Fotta conceded at

oral argument that he will not pursue his state-law claims in the event that his first count is found cognizable under ERISA, we need not decide these issues.

IV.

For the foregoing reasons, we will reverse the judgment of the district court and remand the case for further proceedings consistent with this opinion.

ALITO, *Circuit Judge*, concurring:

I am in general agreement with the opinion of the court. Under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), an ERISA beneficiary may bring a civil action "to obtain other appropriate equitable relief . . . to redress" a violation of the plan. If the plaintiff in this case can establish that the trustees violated the plan by failing to pay his benefits on time, an award of interest would constitute "appropriate equitable relief." Such an award is recognized as appropriate equitable relief in comparable circumstances under the law of trusts. See Restatement (2d) of Trusts § 207 at 470 (1959); 3 Austin Wakeman Scott and William Franklin Fratcher, *The Law of Trusts* § 207.1 at 262-63 (4th ed. 1987); *Nedd v. United Mine Workers of America*, 556 F.2d 190, 207 (3d Cir. 1977); *Toombs v. Daniels*, 361 N.W.2d 801, 810 (Sup.Ct.Minn. 1985). Thus, this is not a case like *Massachusetts Mutual Ins. Co. v. Russell*, 473 U.S. 134 (1985), in which we are asked to supplement the remedies specified in the statute.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

SEP 2 2 2003

No. 03-260

IN THE

Supreme Court of the United States

ABRAHAM FOTTA, individually and on behalf of all other persons similarly situated,

Petitioner,

v.

MICHAEL H. HOLLAND, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA 1974 PENSION TRUST AND ITS TRUSTEES

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QUESTIONS PRESENTED

1. Whether the courts below properly required Abraham Fotta to demonstrate that the Trustees of the UMWA 1974 Pension Plan wrongfully delayed paying his disability pension benefits in violation of ERISA or the 1974 Pension Plan in order to obtain an award of interest on the lump sum portion of his disability pension award.

2. Whether the courts below properly denied class action certification based on the absence of a common issue of law or fact where the courts determined that a decision to award interest on wrongfully delayed disability pension benefits required an examination of the particular facts involved in each pension application.

LIST OF PARTIES

The correct Respondents are the United Mine Workers of America 1974 Pension Trust and its Trustees, Michael H. Holland, Marty D. Hudson, Joseph P. Brennan, and B.V. Hyler. The Trustees administer the UMWA 1974 Pension Trust and pay pension benefits from it in accordance with the terms of the UMWA 1974 Pension Plan. The Petitioner lists the UMWA Health and Retirement Fund of 1974 as a party but there is no such entity.

Petitioner is a beneficiary of the 1974 Pension Trust who receives a disability pension from the 1974 Pension Plan.

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Respondents.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA 1974 PENSION TRUST AND ITS TRUSTEES

STATEMENT OF THE CASE

Petitioner, Abraham Fotta ("Mr. Fotta"), seeks an award of interest on a lump sum pension payment, although his entitlement to the payment and the 1974 Pension Plan's obligation to pay him did not arise until he completed the application process, long after the period covered by the payment began. To obtain a disability pension under the 1974 Pension Plan, Mr. Fotta had to provide evidence to the Trustees that (1) he was in a mine accident; (2) he was granted a Social Security Disability Insurance ("SSDI") award; and (3) the mine

accident caused his disability. The lower courts properly found that the Trustees did not violate ERISA or the 1974 Pension Plan and, thus, did not owe Mr. Fotta interest when they promptly paid him disability pension benefits once he presented evidence from which they could conclude that a mine accident caused his disability.

As explained in more detail below, the Trustees initially denied Mr. Fotta's disability pension application in November 1987 because he did not provide evidence that the July 1984 mine accident in which he either sprained or fractured his ankle had substantially aggravated the preexisting recurrent ankle cysts that were the medical basis for his SSDI award. Mr. Fotta did not administratively appeal this decision, although he was advised that he could do so. Nearly six years later, Mr. Fotta provided the Trustees with a July 1, 1993 decision from the Pennsylvania Supreme Court that awarded Mr. Fotta workmens' compensation benefits and overturned the decisions of a Pennsylvania Workmen's Compensation Referee and the Pennsylvania Workmen's Compensation Board of Appeals that Mr. Fotta's ankle condition was not work related. Within the Pennsylvania Supreme Court's decision was a statement from Dr. Mitchell, an orthopedic surgeon, that "in my opinion the majority of [Mr. Fotta's] disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." Until receipt of the Pennsylvania Supreme Court decision, the Trustees did not have any evidence in the record before them to show that Mr. Fotta's ankle cysts were substantially aggravated by the 1984 trauma.[1] On the basis of Dr. Mitchell's statement, the Trustees determined that Mr. Fotta had demonstrated that his

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[1] The Trustees did have earlier statements from Dr. Mitchell that the ankle trauma *may* have aggravated the ankle cysts but these statements do not amount to evidence that the trauma *did* aggravate the ankle cysts much less evidence that it substantially aggravated the cysts.

ankle injury substantially aggravated the ankle cysts (*i.e.*, the villonodular synovitis) and, consequently, that he was eligible for a disability pension. After reaching this conclusion, the Trustees promptly paid Mr. Fotta the disability benefits to which he was entitled, including a lump sum for monthly payments back to the date of his mine accident.

A. Procedural History

In March 1997, Mr. Fotta filed a complaint against the Trustees. The complaint sought interest payments on a lump sum pension payment that Mr. Fotta had received from the UMWA 1974 Pension Trust as part of his disability pension award. Mr. Fotta attempted to bring the lawsuit as a class action on behalf of all similarly situated beneficiaries who had been denied interest. Mr. Fotta filed an amended complaint on July 28, 1997.

On August 15, 1997, the Trustees filed a motion to dismiss the amended complaint on the grounds that the 1974 Pension Plan does not provide for the payment of interest on back pension payments and ERISA does not provide a cause of action solely for prejudgment interest. On October 23, 1997, the district court granted the Trustees' motion to dismiss with prejudice the ERISA claim.

The United States Court of Appeals for the Third Circuit reversed the lower court's determination that Mr. Fotta failed to allege a cause of action under ERISA. *Fotta v. Trustees of the United Mine Workers of America Health & Retirement Fund of 1974*, 165 F.3d 209 (3rd Cir. 1998). The court held that a cause of action for interest on delayed pension benefits exists under Section 502(a)(3)(B) which empowers courts to award appropriate equitable relief to redress violations of ERISA or ERISA-regulated plans. *Id.* at 213. The court remanded the case for further proceedings consistent with its opinion.

On remand, the district court denied Mr. Fotta's class certification on October 27, 2000 on the grounds that the proposed class lacked a common issue of law or fact because the determination of whether each putative class member should receive interest would vary depending on the particular circumstances of each application. Following a non-jury trial in January 2001, the district court held that Mr. Fotta failed to prove his individual claim for interest. The court determined that Mr. Fotta was required to demonstrate that the Trustees "wrongfully withheld" or "wrongfully delayed" his pension benefits. (Pet. App. at 44A). After reviewing the facts, the district court determined that the Trustees had acted in accordance with the 1974 Pension Plan's eligibility requirements and declined to award Mr. Fotta any interest on his pension award. The lower court entered a final order on March 29, 2001.

On April 30, 2001, Mr. Fotta filed a notice of appeal and, on February 11, 2003, the United States Court of Appeals for the Third Circuit affirmed the district court's March 29, 2001 final order and October 27, 2000 denial of class certification.

B. The 1974 Pension Plan's Eligibility Requirements

The 1974 Pension Plan's disability pension eligibility requirements provide the critical framework for evaluating the Trustees' actions in this case. Article II.C of the 1974 Pension Plan requires that an applicant for a disability pension show that (1) he was involved in a mine accident; (2) he received a Social Security Disability Insurance ("SSDI") award; and (3) the mine accident caused his disability. (Pet. App. at 9A). Where causation is not obvious and direct, a mine accident that "substantially aggravates" a pre-existing condition is also deemed to have caused the disability. *Fotta*, 319 F.3d at 614. The 1974 Pension Plan grants the Trustees "full and final determination as to all issues concerning eligibility for benefits" which numerous courts have held grants the Trustees broad discretion to make

eligibility determinations. *See, e.g., Brogan v. Holland*, 105 F.3d 158, 161 (4th Cir. 1997); *Moats v. UMWA Health & Retirement Funds*, 981 F.2d 685, 687 (3rd Cir. 1992). Pursuant to the 1974 Pension Plan and ERISA, the Trustees cannot make any pension payments until the Plan's eligibility criteria are satisfied.

In making these eligibility determinations, the Trustees apply written plan rules and regulations that are presented in question and answer format ("Q & A"). Q & A 252, promulgated in 1977, is relevant to this case. It defines the circumstances under which the Trustees shall determine that a miner has been "disabled as a result of a mine accident" as follows:

> (1) *Unexpectedness*: The disability must have been unlooked for and unforeseen; (2) *Definiteness*: The disability must be traceable to a definite time, place and occasion which occurred within the course of the mine worker's employment. A progressive disease does not meet this test and therefore cannot be a disability that resulted from a mine accident; (3) *Force or impact*: The disability must have been caused by the exertion or impact of some external physical force or object against the body or by the exertion *or* impact of the body against some external physical object; *i.e.*, not simply as a result of the mine worker's own physical condition.

(Pet. App. at 34A-35A). At issue in Mr. Fotta's application was whether there was a mine accident and, if so, did the mine accident substantially aggravate his disabling ankle cysts or were the ankle cysts primarily the result of his own physical condition.

C. Chronology of Events Related to Mr. Fotta's Pension Application

1. Summary of Events

Mr. Fotta suffered a mine accident in July 1984 in which he sprained or broke his ankle. Mr. Fotta's employer did not prepare an accident report for this incident. In 1986, after receiving an SSDI award for recurrent ankle cysts, Mr. Fotta applied for a disability pension from the 1974 Pension Plan, submitting information from his employer, Pennsylvania Workmen's Compensation, and medical providers. After reviewing the information in Mr. Fotta's application file, the Trustees denied Mr. Fotta's pension application in November 1987 because the record contained no evidence that his mine accident caused or substantially aggravated his ankle cysts. This determination was clearly correct based on the evidence in the record at the time. Mr. Fotta did not question or administratively appeal the Trustees' denial although he was informed of his right to do so. (Pet. App. at 9A).

Mr. Fotta had no further contact with the Funds for six years. In 1993, he submitted to the Trustees a decision of the Pennsylvania Supreme Court, *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144 (Pa. 1993), overturning decisions of a Pennsylvania Workmen's Compensation Referee and Board of Appeals. The Pennsylvania Supreme Court decision contains a statement from an orthopedic surgeon that Mr. Fotta's ankle injury contributed to his disability. Specifically, Dr. Mitchell stated that "in my opinion the majority of his disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d at 1146. Dr. Mitchell also noted that he did not think "that it was possible to separate the problems much more than that with any degree of reliability." *Id.* Based on this new information and despite his failure to appeal the prior determination, the

Trustees exercised their discretion and determined that Mr. Fotta had now demonstrated that a mine accident substantially aggravated his pre-existing ankle cysts. Mr. Fotta was promptly paid after this favorable determination. (Pet. App. at 10A). In accordance with the terms of the 1974 Pension Plan, Mr. Fotta's pension benefits included a lump sum representing monthly payments from the date of the mine accident until the date that he was found eligible for benefits.

2. Detailed Chronology of Events

Prior to July 23, 1984, Mr. Fotta worked as motorman at the United States Steel Mining coal mine. He had problems with his ankle prior to July 23, 1984 due to pigmented villonodular synovitis, a type of recurrent cyst. This evidence was contained in Mr. Fotta's pension file and was known to the Trustees when they initially denied Mr. Fotta's application in November 1987.

On July 23, 1984, Mr. Fotta sprained or fractured his ankle when falling or stepping off a motor. Mr. Fotta worked through his shift. Although no accident report was made, Mr. Fotta alleges that he told his foreman about the accident but declined to go to the employer's medical clinic immediately following the accident. Instead, Mr. Fotta went to see Dr. Eisley on July 24, 1984. Dr. Eisley noted swelling but found no fracture or dislocation. In addition, Dr. Eisley noted that Mr. Fotta had a synovial cyst in his ankle. When his ankle failed to improve, Mr. Fotta went to Dr. Mitchell on August 24, 1994. Dr. Mitchell reported a fracture just behind inner condyle of tibia and a bone cyst of the fibula. On December 3, 1984, Mr. Fotta had a malignant tumor removed from his right ankle. He was hospitalized for two weeks.

On May 10, 1985, relying on testimony from Dr. Mitchell that Mr. Fotta's ankle cyst was not caused by trauma but that it was *possible* that trauma aggravated the cyst, a Pennsylvania Workmen's Compensation Referee found that a

work related injury did not cause Mr. Fotta's ankle cyst and Mr. Fotta had failed to prove that his work related injury aggravated a pre-existing condition. This was the state of the record before the Trustees when they denied Mr. Fotta's application.[2] On July 15, 1985, Mr. Fotta received an SSDI award based on the malignant synovial tumor in his right ankle. On February 7, 1986, Mr. Fotta submitted his disability pension application to the UMWA Health and Retirement Funds' Morgantown Field Service Office.

On May 23, 1986, the Pennsylvania Workmen's Compensation Appeal Board affirmed the Workmen's Compensation Referee's Decision finding that Mr. Fotta's July 23, 1984 accident did not cause or aggravate his ankle cysts. The Appeal Board noted that Dr. Mitchell's testimony states only that it was possible that trauma aggravated Mr. Fotta's tumor and that Dr. Mitchell's testimony failed to establish that the trauma did, in fact, aggravate the tumor. The Appeal Board's decision was also before the Trustees when they initially denied Mr. Fotta's application.

On August 13, 1986, the Trustees received the first records from SSA. Around that same time, United States Steel Mining informed the Funds that: (1) Mr. Fotta worked his whole shift on July 23, 1984; (2) there is no accident report and no report made to mine officials on the date of the alleged injury; (3) no workmen's compensation was awarded. The company also forwarded workmen's compensation documents to the Funds. The workmen's compensation documents showed that the Pennsylvania Workmen's Compen-

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[2] Until 1993, the Trustees did not have Dr. Mitchell's later statements that, in his opinion, the trauma that Mr. Fotta suffered in July 1984 did, in fact, impair the healing of his ankle cysts. It was Dr. Mitchell's subsequent statements that provided the evidence necessary for the Trustees to conclude that Mr. Fotta's mine accident had substantially aggravated his pre-existing condition and, consequently, allowed the Trustees to award him a disability pension.

sation Referee denied Mr. Fotta's claim and that the Workmen's Compensation Appeal Board upheld the Referee's decision. The company reported that they had no medical information because Mr. Fotta had not submitted any to it. On November 4, 1986, Mr. Fotta's file was sent to Barbara McGeoch, Manager, Field Operations, for a disability narrative. On December 30, 1986, handwritten notes of the Trustees' pension processor about Mr. Fotta's application stated that the processor "accept[ed] that there was an ankle injury and that it aggravated a pre-existing tumor." There was actually no evidence in the pension file at that time to support the conclusion that an ankle injury aggravated Mr. Fotta's ankle cysts.[3] The processor also noted the need for more evidence to establish that a mine accident occurred. Logically, of course, the Trustees must resolve whether a mine accident occurred before they can make a determination whether the mine accident caused the disabling condition.

In January 1987, the Funds received some medical records from Mr. Fotta that showed a visit to Dr. Mitchell. Mr. Fotta sent additional records to the Funds in July 1987 that document a July 24, 1984 visit to Dr. Eisley. In September 17, 1987, Richard Robinson, Assistant Director, Morgantown FSO, reviewed Mr. Fotta's file. He concluded, after a review of workmen's compensation records, that Workmen's compensation was denied because "medicals did not confirm disability a result of accident" and the evidence failed to prove that a mine accident occurred. Thus, the evidence at the time failed to show that a mine accident caused or substantially aggravated Mr. Fotta's disabling condition.

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[3] Obviously, the processor's December 30, 1986 notes could not have referred to the March 13, 1987 letter from Dr. Mitchell that the Pennsylvania Supreme Court later found probative of Mr. Fotta's workmen's compensation claim.

On November 18, 1987, Betty Veach, Director, Morgantown Field Service Office, sent Mr. Fotta a denial letter because he had not established that his disability was caused by a mine accident. The reason for the denial is plainly stated in the letter: "You have not established that your disability was caused by a mine accident." The letter informed Mr. Fotta that he could contact her office if he disagreed with the determination and that he could request a hearing within 90 days.

Mr. Fotta did not contact her office or request a hearing. In fact, after the denial of his application, the Trustees had no contact with Mr. Fotta for six years. On June 15, 1993, Mr. Fotta sent the Funds a June 1, 1993 decision from the Pennsylvania Supreme Court that reversed the earlier workmen's compensation referee and board of appeal determinations. The last two pages are from a different case and the final few pages of Mr. Fotta's case are missing from the Funds' copies of this document. Thus, any evidence from those pages was *never* presented to the Trustees and *never* considered by them when acting on Mr. Fotta's application.

Instead of taking the position that Mr. Fotta's belated efforts were precluded because of his failure to appeal the prior determination, the Trustees accepted Mr. Fotta's new information and reconsidered their earlier denial. Based on new information set forth in the Pennsylvania Supreme Court's recitation of the medical evidence concerning Mr. Fotta's injury, the Trustees reversed their earlier denial. Specifically, the Pennsylvania Supreme Court quoted a March 13, 1987 letter from Dr. Mitchell in which he stated that "in my opinion the majority of his disability is due to the pigmented villonodular synovitis but the alleged traumatic ankle injury also is contributing to his incomplete recovery." *Fotta v. Workmen's Compensation Appeal Board*, 626 A.2d 1144, 1146 (Pa. 1993). Dr. Mitchell also noted that he did not think "that it was possible to separate the problems much

more than that with any degree of reliability." Based on this new information, the Trustees exercised their discretion and determined that Mr. Fotta had now demonstrated that a mine accident substantially aggravated his pre-existing ankle cysts. The Trustees did not possess this information when they denied Mr. Fotta's application in 1987. The letter from Dr. Mitchell was never provided to the Trustees. Nevertheless, the Trustees accepted the information in the Pennsylvania Supreme Court's decision as evidence that Mr. Fotta's accident substantially aggravated his ankle cysts and in lieu of an accident report.

By August 12, 1993, M.R. Galusky, a member of the 1974 Pension Trust's staff, completed an initial review form summarizing this new information. On August 13, 1993, M.R. Galusky sent Mr. Fotta a federal income tax withholding form and asked him to confirm certain dates that he was off work in 1950. On August 25, 1993, M.R. Galusky sent a letter to United States Steel Mining inquiring about Mr. Fotta's work history, including Sickness & Accident ("S&A") leave and whether Mr. Fotta worked in non-classified positions. United States Steel Mining reported Mr. Fotta's S & A work history to the 1974 Pension Trust and to Mr. Fotta.

On September 29, 1993, Linda DeFuria, a Disability Pension Analyst and Registered Nurse, recommended that the Trustees award Mr. Fotta a disability pension. On September 30, 1993, Linda Fritz, Senior Manager Eligibility Processing, reviewed Mr. Fotta's file and Ms. DeFuria's recommendation, and she concurred with that recommendation. On November 1, 1993, Kyu Lee, Assistant Director, Eligibility Services, sent Mr. Fotta a letter informing him that he was entitled to a disability pension.

The effective date of Mr. Fotta's pension was initially determined to be September 1, 1985 which was Mr. Fotta's last day of S&A leave, as reported by United States Steel

Mining, and, consequently, the date through which he received pension credit towards a service pension. The lump sum awarded was $18,835 for retroactive payments to the September 1, 1985 pension effective date. Significantly, Mr. Fotta was not entitled to any payment on September 1, 1985 because he did not establish his eligibility until 1993.

On November 9, 1993, Mr. Fotta requested a hearing on the effective date of his pension and requested interest on the lump sum payment. On January 7, 1994, the Trustees sent a notice to Mr. Fotta telling him that prior to the hearing there is a pre-hearing conference where he can explain his dispute and present evidence. A pre-hearing conference was held on January 26, 1994. M.R. Galusky prepared summary of pre-hearing conference that reports that she informed Mr. Fotta that the 1974 Pension Trust would not pay interest on his pension award.

On March 21, 1994, Mr. Fotta submitted a copy of a January 28, 1994 interlocutory order entered on remand from the Pennsylvania Supreme Court that ordered United States Steel Mining to pay workmen's compensation beginning July 24, 1984 and crediting United States Steel Mining for S&A paid. In effect, the workmen's compensation decision on remand converted the period August 1, 1984 to August 1, 1985 from S&A leave to workmen's compensation covered time. M.R. Galusky concluded that Mr. Fotta was entitled to an earlier effective date of August 1, 1984, the first of the month following the month in which Mr. Fotta's disabling mine accident occurred, because the 1974 Pension Plan pays disability benefits for periods covered by workmen's compensation but not covered by S&A. On July 29, 1994, the 1974 Pension Trust sent Mr. Fotta an additional $1,965.00 for the period August 1, 1984 through August 1, 1985.

In March 1997, Mr. Fotta filed a complaint seeking interest on his lump sum payment and the legal proceedings described above began.

ARGUMENT

I. IN AGREEMENT WITH EVERY OTHER CIRCUIT TO HAVE CONSIDERED THE ISSUE, THE COURT OF APPEALS CORRECTLY REQUIRED MR. FOTTA TO DEMONSTRATE A VIOLATION OF THE 1974 PENSION PLAN OR ERISA IN ORDER TO ESTABLISH A CLAIM FOR INTEREST ON DELAYED BENEFITS

The court of appeals properly held that "an ERISA beneficiary who seeks interest on delayed payments must first prove that those payments were withheld in violation of his ERISA plan or of ERISA itself." *Fotta v. Trustees of the UMWA Health and Retirement Fund of 1974*, 319 F.3d 612, 616 (3d Cir. 2003). If the payment of benefits is delayed in violation of the benefit plan or ERISA, the delay is "wrongful" and the beneficiary may assert a claim for interest under Section 502(a)(3)(B) of ERISA as appropriate equitable relief to redress the violation. *Id.* Indeed, the plain language of Section 502(a)(3)(B) limits equitable relief to that which redresses a violation of the Plan or ERISA. *See Mertens v. Hewitt*, 508 U.S. 248, 253 (1993)(Section 502(a)(3)(B) "does not . . . authorize 'appropriate equitable relief' at large but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions of ERISA or an ERISA plan"). Absent a violation of the plan or ERISA, there is simply no statutory basis for an interest claim.

Contrary to Mr. Fotta's assertion, the circuit courts of appeal are not split on this issue. Every appellate court to consider the issue has required a claimant to demonstrate a violation of the plan or ERISA in order to make a claim for interest on delayed benefits under Section 502(a)(3)(B). *Flint v. ABB, Inc.*, 337 F.3d 1326, 1330 (11th Cir. 2003) (beneficiary must demonstrate that fiduciary violated terms of

benefit plan in order to state a claim for interest); *Jackson v. Fortis Benefits Ins. Co.*, 245 F.3d 748, 750 (8th Cir. 2001)("district court correctly applied the rule adopted by this and other circuits, which requires a showing that plan was breached before interest on back benefits may be awarded under ERISA"); *Dunnigan v. Metropolitan Life Ins. Co.*, 277 F.3d 223, 229 (2nd Cir. 2002)(award of interest permitted as equitable relief to remedy unjust enrichment when benefits delayed in violation of plan); *Clair v. Harris Trust and Savings Bank*, 190 F.3d 495, 498 (7th Cir. 1999) (interest available on delayed benefits to redress unjust enrichment that occurs when benefits are not paid when due under plan).

Moreover, the unanimous view of the lower courts that Section 502(a)(3)(B) authorizes a claim for interest as equitable relief when benefits are wrongfully delayed does not conflict with this Court's decisions. This Court has drawn a careful distinction between legal and equitable relief and limited the relief available under Section 502(a)(3)(B) to categories of relief that, prior to the merger of law and equity, were typically available in suits in equity. For example, *Great West Life & Annuity Ins. Co.*, 534 U.S. 204, 210 (2002), makes it clear that money damages based on breach of contract are quintessentially legal even if the relief sought is characterized as restitutionary. In contrast, *Great West* clearly provides that an ERISA beneficiary may make a claim for an accounting of profits on money held in constructive trust on behalf of the beneficiary. *Id.* at 213-14 n.2. A claim for interest on money that should have been paid to a beneficiary under the terms of an ERISA plan but was wrongfully withheld gives rise to an equitable right to the profits that the plan earned on the money while it was withheld. *Fotta v. Trustees of the UMWA Health and Retirement Fund of 1974*, 165 F.3d 209, 214 (3rd Cir. 1998)("any unjust enrichment of plans at the beneficiaries' expense should be avoided"). An interpretation of Section 502(a)(3)(B) that emphasizes disgorgement of wrongful gains

is fully consistent with the decision below, the decisions of the other courts of appeal that have addressed the issue, and this Court's previous rulings.

In this case, the district and appellate courts found that the Trustees acted within the terms of the plan and did not delay making payment to Mr. Fotta once he demonstrated his eligibility for benefits. Throughout this case, Mr. Fotta has ignored the fact that the Trustees could not pay him benefits until he established his eligibility for those benefits and, therefore, he had no right to payment prior to establishing his eligibility. Consequently, the Trustees were not wrongfully withholding benefits to which Mr. Fotta was entitled. Once Mr. Fotta provided the Trustees with evidence that a mine accident caused his disability, they promptly paid him. The measure of what Mr. Fotta was due included a lump sum for monthly payments back to the date of his 1984 mine accident but the benefits were not due until the 1974 Pension Plan's eligibility criteria were fulfilled. As the district and appellate court recognized, the Trustees did not act arbitrarily or capriciously when they initially denied Mr. Fotta's application based on a lack of evidence that a mine accident caused his disability and they dutifully paid Mr. Fotta once he provided the requisite proof. Under these circumstances, Mr. Fotta cannot possibly prove that the Trustees benefited from wrongfully retaining money that they should have paid to him.

II. THE COURT OF APPEALS PROPERLY DENIED CLASS CERTIFICATION WHERE THE RESOLUTION OF EVERY APPLICANT'S CLAIM FOR INTEREST DEPENDS ON THE UNIQUE FACTS AND CIRCUMSTANCES SURROUNDING HIS OR HER PENSION APPLICATION

A district court can only certify a proposed class if the class meets all four requirements of Rule 23(a) of the Federal

Rules of Civil Procedure: numerosity; commonality; typicality; and adequacy of representation. Fed. R. Civ. P. 23(a). Mr. Fotta proposes a class of approximately 107,000 pensioners who received their pensions after some administrative delay between their application and the payment of benefits. (Pet. App. at 51A.) He also proposes a smaller class of approximately 450 persons who successfully appealed an initial denial of benefits. (Pet. App. at 51A.) The court of appeals held that because the "putative members of the class are not entitled to interest if their benefits were not wrongfully delayed, they do not share common issues of law or fact and thus do not meet the Requirements of Rule 23." *Fotta*, 319 F.3d at 618. The court further noted that "[b]ecause both liability and the appropriate remedy must be determined for each plaintiff, no common issues of law or fact exist." *Id.* at 619.

Needless to say, the courts are in complete agreement that Rule 23(a) requires commonality. Mr. Fotta has identified no disagreement among the lower courts on this issue and the Trustees are aware of no interpretation of Rule 23(a) in any court that would call into question the lower courts' denial of class certification in this case. Based on the foregoing, there is no issue with respect to class certification that merits this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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